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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF TEXAS; MARK WHITE, GOVERNOR OF THE STATE OF TEXAS; AND MYRA A. McDANIEL, SECRETARY OF STATE OF THE STATE OF TEXAS,

Appellants

vs.

THE UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Western District of Texas

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JURISDICTIONAL STATEMENT

JIM MATTOX
Attorney General of Texas

W. ROBERT GRAY
Assistant Attorney General and Attorney of Record

DAVID R. RICHARDS
Executive Assistant Attorney General for Litigation

ROBERT L. LEMENS
Assistant Attorney General

MARY F. KELLER
Special Assistant Attorney General

Supreme Court Building
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-4643

Attorneys for Appellant

12

QUESTIONS PRESENTED

1. Whether the exercise of gubernatoral discretion in setting the dates for a special congressional election at the earliest practicable times, according to an established state practice extant before the November 1, 1972, coverage date of section 5 of the Voting Rights Act of 1965 and continued under statutes precleared pursuant to section 5, was a practice different from that in force or effect on the coverage date, such that section 5 coverage was invoked and preclearance for the practice was required, even though the exercise of gubernatorial discretion in this instance did in fact follow the pre-1972 practice and the attendant statutes previously precleared.

2. Whether the jurisdictional coverage of section 5 of the Voting Rights Act of 1965 is so comprehensive that it effectively prevents state and local election officials from exercising any vestige of discretion in response to contingencies requiring prompt action.

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Appellee.[1]

On Appeal from the United States District Court for the Western District of Texas

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JURISDICTIONAL STATEMENT

The State of Texas, its Governor Mark White, and its Secretary of State Myra A. McDaniel (collectively designated as "Texas") appeal from the final judgment of the District Court for the Western District of Texas, dated August 1, 1985, holding that preclearance under Section 5 of the Voting Rights Act of 1965 is required for each exercise of gubernatorial discretion in setting nonuniform special election dates.

OPINION BELOW

The opinion of the district court below, *United States of America v. State of Texas, et al.*, Civil Action No. SA-85-CA-2199 (W.D.Tex. Aug. 1, 1985), is unreported. A copy of this opinion is included as Appendix A.

1. The caption of the case as styled above contains the names of all the parties in this proceeding. S. Ct. R. 15.1(b).

JURISDICTION

The District Court, sitting with three judges, had jurisdiction of this case pursuant to 42 U.S.C. § 1973c (1982) and 28 U.S.C. § 2284 (1982). The hearing before the district court, set to hear the application of the United States for temporary and preliminary injunctive relief, concluded with the entry of a final judgment and permanent injunctive relief against Texas.

The date of the entry of the final judgment and order sought to be reviewed was August 1, 1985. On August 6, 1985, Texas applied for a stay of this order to the Honorable Byron R. White, Associate Justice of this Court and Circuit Justice for the Fifth Circuit; the application for stay was denied on the same day. Notice of Appeal was filed in the U.S. District Court for the Western District of Texas on September 27, 1985. 28 U.S.C. § 2101(b) (1982) and Sup. Ct. R. 10. See Appendix B.

This Court has jurisdiction of this appeal pursuant to 42 U.S.C. § 1973c (1982). Docketing is pursuant to S. Ct. R. 12.1 & -.3.

STATUTES

The application and construction of the following statutes and rules are involved in this case:

Federal Statute

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c (1982)

Federal Rules Implementing Section 5 of the Voting Rights Act of 1965

28 C.F.R. §51.6 (1984)
28 C.F.R. §51.14(a) (1984)
28 C.F.R. §51.32 (1984)
28 C.F.R. §51.48 (1984)

Provisions of the Texas Election Code:

Tex. Elec. Code Ann. art. 1.08c (Vernon Supp. 1985)
Tex. Elec. Code Ann. art. 2.01b (Vernon Supp. 1985)
Tex. Elec. Code Ann. art. 4.01 (Vernon Supp. 1985)
Tex. Elec. Code Ann. art. 4.09 §§ 1,2,4,7 (Vernon 1967 & Supp. 1985)
Tex. Elec. Code Ann. art. 4.10 (Vernon Supp. 1985)
Tex. Elec. Code Ann. art. 4.11 (1)-(4) (Vernon Supp. 1985)

All of the above provisions of law are set out in full in Appendix C.

STATEMENT OF THE CASE

Introduction

This case arises from Governor White's having called a special congressional election, under Texas election law and practice, for legally permissible dates which varied from uniform election dates also allowable under the same state election law. The state election law and closely intertwined practice which underlay the Governor's exercise of discretion had previously been held by a federal court to be outside the coverage and preclearance requirement of section 5 of the Voting Rights Act of 1965, because of the practice's pre-1972 existence and the prior preclearance of the election statutes. The State, accordingly, took the position that additional preclearance was not required in this instance.

The District Court, however, held that the prior status of this practice under section 5 of the Voting Rights Act was not controlling because of the Governor's deviation from the uniform, specific dates contained in the Texas Election Code; and it concluded that each separate choice of a nonuniform date would require individual preclearance, lest the purposes of the Voting Rights Act be evaded.

This case thus revolves around the question of whether a state election standard, practice, or procedure permitting the use of discretion must be submitted for preclearance under section 5 of the Voting Rights Act in each separate instance in which the administration of state election law entails an official

act whose precise nature is not expressly fixed and restricted from any variation.

Factual Background

On May 24, 1985, former Congressman Sam B. Hall, Jr., resigned as U.S. Representative from the First Congressional District of Texas. Governor White, pursuant to procedures set forth in Chapter Four of the Texas Election Code[2], as modified by the discretionary provisions in Tex. Elec. Code Ann. art. 2.01b (Vernon Supp. 1985), declared the existence of an emergency pursuant to his discretionary authority and called for a special election to fill the vacancy to be held on June 29, 1985. Under articles 4.01 and 4.10(2) of the Election Code, candidates wishing to have their names placed on the ballot had a five-day filing period and were required to file applications by May 29, 1985. Had Governor White exercised his discretion not to declare an emergency pursuant to article 2.01b(b), the relevant Texas Election Code provisions would have resulted in a filing period of June 10 to July 10, 1985, Tex. Elec. Code Ann. arts. 1.08c, 4.10(2) (Vernon Supp. 1985), and the special election would have been on August 10, 1985. Articles 2.01b(a) & (b), 4.09(1) & (4) of the Election Code. Because no candidate received a majority in the emergency special election on June 29, 1985, Governor White, pursuant to article 4.11(1), called a runnof election for August 3, 1985. That runoff has been held and the Honorable Jim Chapman was elected and has taken his place in the U.S. House of Representatives.

On June 27, 1985, two days before the emergency special election, officials of the United States Department of Justice ("Justice") notified Texas election officials that, in their view, the emergency special election called by the Governor under his statutory discretion had to be precleared pursuant to section 5 of the Voting Rights Act of 1965 (as amended), 42 U.S.C. § 1973c (1982) ("section 5").

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2. Tex. Elec. Code Ann. art. 4.01 (Vernon Supp. 1985); Tex. Elec. Code Ann. art. 4.09 §§ 1, 2, 4, 7 (Vernon 1967 Supp. 1985); Tex. Elec. Code Ann. art. 4.11 (1)-(4) (Vernon Supp. 1985).

These and other provisions of the Election Code, after initial full citation, will be cited as "article _____ of the Election Code" or simply as "article _____."

Specifically, Justice asserted that the establishment of the election dates and the filing date fell within the scope of this Court's decision in *NAACP v. Hampton County Election Commission*, 105 S. Ct. 1128 (1981). Texas responded that the statutory procedures for establishment of these special election dates in an emergency did not require preclearance, relying on the decision in *Turner v. Fainter*, No. A-83-CA-35 (W.D. Tex. Feb. 8, 1983) (three-judge court) (unpublished opinion; copy attached as Appendix D) that the Governor's exercise of his statutory discretion in a virtually identical situation was not the administration of a different or non-precleared procedure which required pre-clearance. App. at D-2. Strongly affecting the *Turner* court's decision were the facts that article 2.01b—the source of the Governor's emergency discretionary powers—had been given prior section 5 preclearance, and that the practice which the statute codified predated 1972, the date of section 5 coverage in Texas. *Id.*

After the first special election, but before the runoff, Justice brought suit in the U.S. District Court for the Western District of Texas and on August 1, 1985, a special three-judge court—convened pursuant to section 5 and 28 U.S.C. §2284 (1984)—met to hear Justice's motion for a temporary restraining order and a preliminary injunction requiring officials of the State of Texas to submit the questioned election procedures for preclearance. Despite the fact that the purpose of this hearing was only to consider interim injunctive relief, the court proceeded to hear the matter on the merits and, after briefly hearing evidence offered by Texas, ordered the State to submit an application for preclearance on that very day—August 1. In the alternative, the Court gave the State and its officials until August 9, 1985, to make a section 5 submission, but warned that failure to submit by this date would result in the court's voiding the election.

On August 6, 1985, Texas applied for a stay of the district court's order to the Honorable Byron R. White, Associate Justice of this Court and Circuit Justice for the Fifth Circuit; and on the same day the application was denied. Submission was accordingly made on August 8, 1985; and preclearance was received on August 14, 1985.

Questions Presented and Preserved

In its Brief in Opposition to Motion for Preliminary Injunction (Appendix E) ("Brief"), the State of Texas—continuing to rely on *Turner v. Fainter, supra* (App. at E-5)—presented arguments in opposition to Justice's motion which now consitute the issues for this Court's resolution. The State distinguished *NAACP v. Hampton County Election Commission, supra,* 105 S. Ct. 1128, by showing that the *Hampton County* case was concerned with "*new* legislation combined with unprecedented procedures," thus resulting there in election officials' acting without *any* statutory or other legal authority, whether precleared or not. App. at E-6. There the creation of election schedules was not associated with and did not flow from existing procedures.

In contrast Texas argued that, in this case, the Governor acted to set an election date in accordance with practices and provisions of the Election Code that were precleared or that pre-existed the 1972 date of section 5 applicability in Texas. App. at E-4—E-5. Texas demonstrated that the *practice* of calling special elections to fill vacancies—followed in this case—indeed pre-existed the 1972 date of applicability. See App. at E-3. The State also pointed out the destructive effect which ordering the relief requested by Justice would have on the Governor's discretionary authority, particularly in emergency situations where prompt action is necessary to a minimum of interruption in the political process. App. at E-8—E-9. Such a result would surely, on this line of reasoning, be contrary to congressional intent. Furthermore, delays in holding elections caused by the extendable 60-day periods of consideration which Justice is allowed to process section 5 submissions could in fact, the State argued, cause hardships to citizens denied representation in Congress or other public bodies during the delays. *Id.* Finally, the State argued that the nature of an electoral "change" subject to section 5 preclearance coverage is determined from a comparison of the challenged action with "*past* practice or statutorily authorized procedure," App. at E-6 (emphasis supplied), not from a comparison with "the established contraints and procedures of . . . law" which have section 5 validity and which form the *contemporaneous* basis of the challenged action. *Id.*

The District Court rejected the State's reliance on *Turner v. Fainter, supra*, and found *NAACP v. Hampton County Election Commission, supra*, 105 S. Ct. 1128, to be controlling. *United States v. State of Texas, et al.*, Civil Action No. SA-85-CA-2199 (W.D. Tex., Aug. 1, 1985) (Appendix A), App. at A-2—A-3. Though it expressly found that the practice followed by Texas pre-dated 1972, App. at A-3, it nonetheless held that

> the fact remains that no dates are set [in the statute, other than the four uniform dates in article 2.01b(a), none of which was chosen] and that there is no requirement under Texas law to prevent discretion being exercised in a manner that would adversely impact voters protected by the [Voting Rights] Act. Pre-existing *specific* procedures and practices need not be precleared, but the pre-existing exercise of discretion to schedule election dates at will cannot be perpetuated without destroying the Voting Rights Act.

Id. (emphasis in original). The Court left no doubt that the Governor's exercise of his discretion pursuant to article 2.01b in ordering "the emergency special election" was the target of its holding and order, App. at A-1—A-2, and that its determination that the Governor's exercise of discretion was a "change" within section 5 coverage was based solely on the notion that selection of election and candidate filing dates have, in principle, a *potential* for dilution of minority voting strength. App. at A-2.

The court's conclusion was that

> [i]t is necessary for the Attorney General or other appropriate official of Texas to obtain [section 5] clearance of the special election scheme for the election to be valid.

App. at A-4. Because this holding is presumably binding precedent on the State in all future situations calling for the expeditious administration of the election laws in filling vacancies to public office, the State of Texas appeals from the holding and judgment of the District Court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case concerns whether the exercise of official discretion in setting the dates for a special congressional election at the earliest practicable times, according to an established state practice extant before the November 1, 1972, coverage date of section 5 of the Voting Rights Act of 1965, and continued under statutes precleared pursuant to section 5, was a practice different from that in force or effect on the coverage date, such that section 5 was invoked and preclearance for the practice was required. Indeed, it concerns the extent, if any, to which state and local election officials may validly exercise discretion in response to contingencies pursuant to state standards, procedures or practices already precleared under section 5 without being required to submit their proposed discretionary actions for additional preclearance. At a more fundamental level, the issue is whether the jurisdictional coverage of section 5 is so totally inconsistent with state and local officials' use of discretion in contingent matters requiring prompt action that it completely obliterates the possibility of their ever exercising such discretion.

These are substantial questions having obvious importance to state-federal relations in the administration of the Voting Rights Act. Moreover, their resolution would involve this Court in a novel endeaver: setting the precise limits of section 5's coverage or jurisdiction by stating an exact definition of the "change" in voting standards, procedures, or practices whose occurrence invokes that coverage. The State of Texas contends that, when a properly drafted state electoral statutory scheme permitting limited discretion or variation in election procedures is once precleared (or predates section 5 applicability), each administrative step taken in the exercise of such discretion pursuant to that source of authority is not itself a section 5 "change".

Coverage under section 5 of the Voting Rights Act of changes in state election standards, practices or procedures is determined by "whether such changes have the potential for diluting the value of the [minority] vote *and* are within the definitional terms of § 5." *Georgia v. Untied States,* 411 U.S. 526, 534 (1973) (emphasis supplied). In its decisions on section 5 coverage

issues—from *Allen v. State Board of Elections*, 393 U.S. 544, 563-72 (1969) through *NAACP v. Hampton County Election Commission, supra*, 105 S.Ct. at 1137—this Court has concentrated on defining the nature of changes in state electoral standards and practices subject to section 5 coverage and preclearance in terms of their *potential to discriminate* against minority voters. Without conceding that the special election dates here had any such potential to discriminate, the State of Texas asks this Court in this appeal to consider the nature of such changes on the basis of the other element with which its decisions have not expressly dealt: "the definitional terms of § 5." *Georgia v. United States, supra*, 411 U.S. at 534.

The use of such a basic definitional approach to section 5 coverage can resolve the issue of the scope and permissibility of discretionary actions in state electoral practices. Necessary elements of this definitional method of inquiry are consideration of whether a change has occurred with respect to *past* procedures or practices, consideration of whether the questioned standards or practices have already been precleared (or predate section 5 applicability to the jurisdiction), and analysis of the breadth of discretion authorized. Tested under this approach, the discretionary action of the Governor was not subject to section 5 coverage as claimed by Justice, and a place for some limited state discretion would be preserved from needless section 5 preclearance scrutiny.

Moreover, by defining more precisely the scope of submissible change, the Court would by this approach provide additional predictable standards for many section 5 submissions, a matter of great importance in administering section 5 in view of "the sheer volume of applications for preclearance" and the potential for increase in this workload if *every* state or local discretionary act is subject to preclearance. *Cf. City of Port Arthur v. United States*, 459 U.S. 159, 103 S.Ct. 530, 538-39 (1982) (Powell, J., dissenting). Because every administrative step taken by an election official, if dissected carefully enough, may be seen to include discretionary elements, the position urged by Justice and upheld by the court below would result in section 5 coverage of, literally, an infinite number of administrative steps for any one election. This appeal presents and opportunity to limit section 5 to a scope which can be administered, thus effectuating Congressional intent.

1. The basic character of a "change" submissible under section 5 is established in the words of the statute itself:

> [W]henever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, or practice, or procedure with respect to voting *different from that in force or effect on November 1, 1972* [then the State or political subdivision must seek judicial approval or preclearance by the Attorney General.]

42 U.S.C. § 1973c (1982) (emphasis supplied). The statute plainly requires, as a definitional threshold, that the contemporaneous suspect standard, procedure, or practice be compared with the appropriate *past* standard, procedure or practice to determine whether a change subject to section 5 coverage has occurred. While this Court has apparently never expressly held that such a comparison with the past is required to establish jurisdiction under section 5, many decision have implicitly assumed that it is.[3] See, e.g., *Allen v. State Board of Elections, supra,* 393 U.S. at 823; *Perkins v. Matthews,* 400 U.S. 379, 382-83, 394 (1971); *Georgia v. United Staes, supra,* 411 U.S. at 527-31. Even *NAACP v. Hampton County Election Commission, supra,* 105 S.Ct. 1128—upon which both Justice and the District Court placed heavy reliance—continued this implicit assumption. *Id.* at 1133-34. The substantive standard for section 5 compliance—that a change lead to no "retrogession" in minority voting strength, *Beer v. United States,* 425 U.S. 130, 141 (1976)—also directly implies a comparison with past conditions.

The District Court did not conduct such a comparison with past standards, procedures or practices. Instead it began with the specified uniform dates in the Texas Election Code and

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3. See *United States v. Board of Commissioners of Sheffield, Alabama,* 435 U.S. 110, 123-24 (1978), where the Court used implicit assumptions in its decisions in deciding a Voting Rights Act issue.

simply compared those with the Governor's choice of other election and filing dates authorized by the emergency powers granted in the code. The administration of this one election according to the relevant provisions of the code simply did not present an opportunity for the definitionally required comparison with past practice, because the items which the District court compared—uniform dates and variable dates actually chosen—were available at the same time for gubernatorial action. Thus the characterization of the Governor's choice between currently available legal alternatives as a section 5 "change" from past practice was erroneous.

When the focus of analysis is placed directly on article 2.01b—the predominant and controlling statutory element of the state's election procedures under consideration,—the Governor's variation of the election dates under article 2.01(b) from the uniform dates listed in article 2.01b(a) cannot possibly be considered a change in past standards or practices.[4] The two provisions of aticle 2.01b are entirely contemporaneous and indeed the element of time does not even logically apply to the choice to follow one provision rather than another in a single circumstance requiring a special election.

2. Each of the Election Code provisions under which the Governor acted had either been precleared, or it pre-existed the November 1, 1972, date when section 5 coverage was extended

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4. Article 2.01b(a) provides in relevant part:

> (a) Except as provided in Subsection [ ](b). . . of this section, every general (regular) or special election held by the state . . . must be held on one of the following dates: the third Saturday in January, the first Saturday in April, the second Saturday in August, or the first Tuesday after the first Monday in November.

Article 2.01b(b) provides in relevant part:

> (b) When a vacancy in office is to be filled at a special election, the election must be called for a date specified in Subsection (a) unless the governor finds the existence of an emergency that warrants calling the election for an earlier date. If the governor orders an emergency election, the election proclamation shall include a statement that identified the nature of the emergency. An emergency election ordered by the governor may not be held on a day other than Tuesday or Saturday.

to Texas. See 40 Fed. Reg. 43746 (1975) (providing date of Texas coverage). Article 2.01b, the key provision containing the Governor's discretionary authority, was precleared three times: in 1975, when it was first enacted as a temporary measure, codifying prior practices (R. Exh. 4)[5]; in 1977, when it was permanently enacted (R. Exh. 5); and in 1983, when it was amended to reaffirm the pre-1972 prevailing practice with the effect of restricting the Governor's discretionary powers. (R. Exh. 6). See Appendix F. The District Court held that this preclearance did not enable the State validly to make changes pursuant to the statute, citing 28 C.F.R. § 51.14(a) (1984) (certain election changes contingent on future events require preclearance); but the application of that regulation in its own terms only to "political subunits" makes it immaterial here.[6] The remaining code provisions were also, as indicated, valid under section 5.[7]

Thus Governor White acted in calling the special election entirely under statutory authority, every provision of which was valid under section 5 either because of preclearance or pre-existence before 1972. In direct contrast, the election officials in *Hampton County* acted without *any* statute or tradition as authority in establishing the candidate qualification period and the election date, and *a fortiori* without any statutory (or other) authority ever subjected to section 5 validation procedures.

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5. Exhibits entered into the record of the August 1, 1985, hearing of the Court below are designated as "R. Exh._____."

6. 28 C.F.R. 51.6 (1984) makes it plain that the term "political subunits" does not include states.

In addition, Justice, in its preclearance letters (R. Exh. 4, R. Exh. 5, and R. Exh. 6), appeared to attempt to reserve some additional issue for future review, but these statements may be regarded as immaterial to the issue here, insofar as they merely reserved the statutory power of substantive review, see 28 C.F.R. § 51.48 (1984), and insofar as they are not otherwise based on "objective ground rules." *Georgia v. United States, supra*, 411 U.S. at 536. These preclearance letters are attached in Appendix F.

7. Articles 4.01 and 4.09 were originally enacted in 1951 and thus predated Section 5 coverage. Both were amended in 1981 to delete obsolete language and were precleared on August 8, 1981 and September 8, 1981, respectively.

Aticle 4.10 pre-existed 1972 and was amended in 1975, receiving preclearance on January 27, 1976.

Article 4.11 and its amendments totally pre-exist 1972.

Article 1.08c was precleared on August 22, 1979.

105 S.Ct. at 1113, 1135, 1137. Because the District Court failed to make this contrast, it erred in deciding this case on the controlling basis of *Hampton County*.

3. This Court has emphasized the importance of consideration of informal electoral *practices* as well as more formal standards and procedures in determining the scope of section 5 coverage. *Allen v. State Board of Elections, supra*, 393 U.S. at 566-67. In determining whether a section 5 change in practice has occurred in Texas, "[t]he proper comparison is between the [existing] system and the system actually in effect on November 1, 1972, regardless of what state law might have required." *City of Lockhart v. United States*, 460 U.S. 125, 132 (1983) (substantive section 5 issue).

Governor White, in setting the election dates at issue here, followed the very practice in effect on November 1, 1972, and for at least six years before that date, for calling special elections and setting attendant dates for filling vacancies in congressional seats. Evidence adduced in the District Court shows that, since at least 1966, Texas Governors have called special elections for the earliest practicable date after a congressional vacancy occurred. (R. Exh. D); Appendix F. The initial enactment of article 2.01b of the election code in 1975 simply codified this prior practice. The District Court, despite its acknowledgement that the pre-1972 practice of calling special elections was unchanged in this instance, *United States v. Texas, supra*, App. at A-3, nonetheless erred in ruling that the current practice was a section 5 "change." In so doing it failed to recognize the statutory perimeters of section 5 coverage and thus smothered the State's ability to exercise limited discretion in these circumstances.

4. The actions in *Hampton County* of the South Carolina Attorney General and election officials, in scheduling both a candidate filing period for a time already past and a special March election, were contrary to the express terms of the state statute in question. "That statute provided for an August filing period and a *November* election, which . . . is quite another matter." 105 S. Ct. at 1128 (emphasis in original). This exercise of discretion by South Carolina officials was thus totally unfettered and outside the bounds of any state election statutes or standards.

Governor White's exercise of discretion under the Texas Election Code was, to the contrary, circumscribed by several provisions of that code. When a Governor invokes the emergency provisions of article 2.01b(b), he is empowered to set the date of the special election for a date earlier than one of the four uniform dates specified in article 2.01b(a). That electon date, which by the terms of article 2.01b(b) must fall on a Saturday or a Tuesday, must be scheduled for a time between 36 and 90 days after the Governor's public notice or proclamation of the election. Articles 4.01 and 4.09(a) of the Election Code. In the event of a runoff election, the Governor must, within five days after the official results are declared in the first election, set an election date not fewer than 30 or more than 40 days after the date of his proclamation ordering the election. Article 4.11(a). The filing period, at an absolute minimum, must be five days long, commencing with the Governor's proclamation. Articles 4.01 and 4.10(2).

The standards provided by these statutes do not create a form of absolute discretion which exists, as this Court has found in an administrative law context, when "statutes are drawn in such broad terms that . . . there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 411 (1971) (citation omitted). Rather they constitute the basis of an "unambiguous and recordable" section 5 submission to the Attorney General, *Allen v. State Board of Elections, supra,* 393 U.S. at 571, from which he can determine, by the range or "window" of options available to the Governor, whether dilution of or retrogression in minority voting would result under any possible special election schedule.

Section 5, of course, grants the Attorney General 60 days to process a preclearance submission, and this period is freely extendable. See, e.g. *Georgia v. United States, supra*, 411 U.S. at 539-41. These delays for action by Justice could obliterate the Governor's statutory short-term discretion (illustrated, e.g., by the 90-day limit on calling an emergency special election), thereby prolonging vacancies in important public offices. Unlike the situation in *Hampton County* where South Carolina's own delay in making section 5 submission created a problem, 105 S. Ct. at 1136, under the District Court's ruling there is nothing that Texas can do but make a prompt submission of the "change" and request that the Attorney General undertake expedited review—an action which he is not lawfully required to do. *Cf.* 28 C.F.R. § 51.32 (1984). Surely the Congress did not intend, by enacting section 5, to curtail such limited state electoral procedures when their scope of operation is readily reviewable upon initial preclearance submission of the underlying source of authority.

THE DISTRICT COURT'S JUDGMENT WAS ON THE MERITS, FINAL, AND IS NOT MOOT

Though Justice's motion before the District Court at the August 1, 1985, hearing was for preliminary injunctive relief, the Court plainly reached the merits of the controversy and entered a judgment and order having final effect. Thus S. Ct. R. 15.1(i) does not apply here.

Futhermore, though the special congressional elections in question have been held, the winning candidate has taken office, and Justice has since precleared the election procedure, the case is not moot, because the District Court's judgment and holding retain precedential value and are applicable to future action by the Governor. As this Court ruled in a similar election case where the election had already been held:

> The problem is . . . "capable of repetition, yet evading review" . . . The need for its resolution thus reflects a continuing controversy in the federal-state area.

Moore v. Ogilvie, 394 U.S. 814, 816 (1969) (citation omitted.)

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant Attorney
General for Litigation

MARY F. KELLER
Special Assistant
Attorney General

W. ROBERT GRAY
Assistant Attorney General
and Attorney of Record

ROBERT L. LEMENS
Assistant Attorney General

Supreme Court Building
P.O. Box 12548
Austin, Texas 78711
(512) 475-4643

October, 1985

Attorneys for Appellants

APPENDIX A

Opinion of the Court Below

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**Civil Action No. SA-85-CA-2199**
v.	)	
STATE OF TEXAS; MARK WHITE, GOVERNOR OF THE STATE OF TEXAS; MYRA A. McDANIEL, SECRETARY OF STATE OF THE STATE OF TEXAS,	)	
Defendants.	)	

Before REAVLEY, Circuit Judge, GARCIA and NOWLIN, District Judges.

PER CURIAM:

The United States is seeking an order requiring Texas to submit its emergency election plan to the Attorney General as provided by section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1982).

On May 24, 1985, former Congressman Hall resigned as Representative of the First Congressional District of Texas and Governor White, exercising the discretion granted him by Tex. Elec. Code § 2.01b (Vernon Supp. 1985), called for an emergency special election with a candidate qualification period ending on May 29, 1985 and a special election on June 29, 1985. Had Governor White not declared an emergency, the Texas Election Code provided that the candidate qualification period would have been from June 10 to July 10, 1985, Tex. Elec. Code §§ 1.08c, 4.10(2) (Vernon Supp. 1985), and the special election would have been on August 10, 1985, Tex. Elec. Code §§ 2.01b(a), (b) & (e), 4.09(1), (4) (Vernon 1967 & Supp. 1985). Because no candidate received a majority in the emergency

special election on June 29, 1985, Governor White, pursuant to Tex. Elec. Code § 4.11(1) (Vernon Supp. 1985), scheduled a runoff election for Saturday, August 3, 1985.

On June 27, 1985, two days before the emergency special election, the United States notified Texas that the emergency special election had to be precleared and offered to process the submission within twenty-four hours of receipt. Texas responded that the setting of the dates under the precleared statute was not a change and therefore did not need to be precleared again, citing *Turner v. Fainter,* No. A83CA35 (W.D. Tex. Feb. 8, 1983).

This court is required to determine whether the emergency special election plan adopted by Texas is a change in voting procedures that has not been precleared. *United States v. Board of Supervisors,* 429 U.S. 642, 645-46, 97 S.Ct. 833, 835, 51 L.Ed.2d 106 (1977). The United States argues that the establishment of a shortened candidate qualification period, the selection of June 29, 1985 for the emergency special election, and the selection of August 3, 1985 for the runoff election were changes that have not been precleared. Texas replies that it follows the decision of the court in *Turner v. Fainter,* No. A83CA35 (W.D. Tex. Feb. 8, 1983) (unpublished), which held that the calling of emergency special elections as provided by a Texas statute that had been precleared did not amount to a change that required preclearance. We believe that the development of this record by the United States and recent Supreme Court teaching requires us to take a different view than did the *Turner v. Fainter* panel.

To determine whether an enactment or administration of a voting procedure triggers the preclearance requirement of section 1973c, the court must determine whether it has a potential for discrimination. *Daugherty County v. White,* 439 U.S. 32, 42, 99 S.Ct. 368, 374, 58 L.Ed.2d 269 (1978). The Court has held that changing election dates and qualification periods have the potential for discrimination. *See N.A.A.C.P. v. Hampton County Election Commission,* _____U.S._____, _____, 105 S.Ct. 1128, 1134-35, _____L.Ed.2d_____ (1985). Here, the wide manipulation of the dates of candidate qualification and of voting—*possible* under the emergency provision of the Texas election law—provide a potential for discrimination. Therefore,

any variation from the election dates stated in the statute, having a potential for discrimination, must be precleared.

The State shows that the practice, preexisting the November 1, 1972 date when Texas became subject to the Act, was for Texas governors to call special elections to fill vacant congressional seats in the same manner followed in this instance. However, the fact remains that no dates are set and that there is no requirement under Texas law to prevent discretion being exercised in a manner that would adversely impact voters protected by the Act. Preexisting *specific* procedures and practices need not be precleared, but the preexisting exercise of discretion to schedule election dates at will cannot be perpetuated without destroying the Voting Rights Act.

Nor do we agree with the State's contention that preclearance of the election code carried with it approval by the Attorney General of whatever emergency election schemes were subsequently ordered by the state election official. The construction of the Attorney General's prior action is made clear by his appearance in this case as well as by Department of Justice regulations:

> Enabling legislation and contingent or nonuniform requirements.
>
> (a) The failure of the Attorney General to interpose an objection to legislation: (1) That enables or permits political subunits to institute a voting change or (2) that requires or enables political subunits to institute a voting change upon some future event or if they satisfy certain criteria does not exempt the political subunit itself from the requirement to obtain preclearance when it seeks or is required to institute the change in question, unless implementation by the subunit is explicitly included and described in the submission of such parent legislation.

28 C.F.R. § 51.14(a) (1984).

Since the election plan already implemented must be cleared for the runoff election set for August 3, 1985, to have any

effect, it is immaterial that section 4.11(1) of the Texas Election Code preexisted 1972.

It is therefore necessary for the Attorney General or other appropriate official of Texas to obtain clearance of the special election scheme for the election to be valid. That clearance may be made after the fact of the election in some cases. *N.A.A.C.P. v. Hampton County Election Commission*, _____U.S._____, 105 S.Ct. 1128, 1138, _____L.Ed.2d_____ (1985). The Attorney General assures the court that, if the State submits its plan today, it will likely receive a response tomorrow—in advance of the election on the following day. By that means the election may proceed without anyone's decision being affected by the outcome of the election.

This court orders the defendants, or any of them, to submit the special election scheme to the United States Attorney General. This shall be done today. If not done today, the court will not enjoin or void the election. The defendants may submit the election scheme to the Attorney General by August 9, 1985. If, by August 15, 1985, the Attorney General's approval is given, no further relief will be ordered and the election results will stand. If, however, the defendants do not submit the election plan to the Attorney General by August 9, 1985, the election will be declared void.

We decide that the defendants have been in good faith in not seeking preclearance and in relying on the *Turner v. Fainter* decision and that there would be no cause to set aside the election if the defendants comply with the present order. *See Hampton County Election Commission*, _____U.S. at_____n.36, 105 S.Ct. at 1138 n.36, _____L.Ed.2d at_____n.36.

IT IS SO ORDERED.

APPENDIX B

Notice of Appeal and Related Documents

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF TEXAS

FILED
SEP 9, 1985
CHARLES ... ER, Clerk
By Deputy

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff-Appellee	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	SA-85-CA-2199
	§	
THE STATE OF TEXAS, et al.,	§	
	§	
Defendants-Appellees.	§	

NOTICE OF DIRECT APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. §2101(b)(1982) and Sup. Ct.R. 10, the State of Texas, its Governor Mark White, and its Secretary of State Myra A. McDaniel file this Notice of Appeal of the order and holding of the District Court in the above styled case, entered on August 1, 1985. Appeal is taken directly to the United States Supreme Court pursuant to 42 U.S.C. §1973c (1984). Service is being made at the time of this filing on the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530. Proof of service is attached.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas
and Attorney for Appellants

By: W. Robert Gray
W. ROBERT GRAY
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

FILED
SEP 20 1985
CHARLES W. VAGNER, Clerk
By dw Deputy

UNITED STATES OF AMERICA,	$	
	$	
Plaintiff-Appellee	$	
	$	
VS.	$	CIVIL ACTION NO.
	$	SA-85-CA-2199
	$	
THE STATE OF TEXAS, et al.,	$	
	$	
Defendants-Appellees.	$	

PROOF OF SERVICE

Pursuant to Sup. Ct. R. 28.4(a), I certify that on the 19th day of September, 1985, one copy of the Appellants' Notice of Direct Appeal to the U.S. Supreme Court of the District Court's Order and Opinion of August 1, 1985, in the above case was mailed by depositing it in U.S. Postal facilities, first-class postage prepaid, both to (1) the Solicitor General of the United States, U.S. Department of Justice, Washington, D.C. 20530, and to (2) Steven H. Rosenbaum, Attorney, Voting Section, Civil Rights Section, U.S. Department of Justice, Washington, D.C. 20530.

All parties required by Sup. Ct. R. 28.4(a) to be served have been served.

I am a member of the bar of the U.S. Supreme Court. My entry of appearance before that Court in this case is attached.

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF TEXAS

FILED
SEP 20 1985
CHARLES W. VAGNER, Clerk
By Deputy

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff-Appellee	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	SA-85-CA-2199
	§	
THE STATE OF TEXAS, et al.,	§	
	§	
Defendants-Appellant.	§	

ENTRY OF APPEARANCE OF COUNSEL BEFORE THE SUPREME COURT OF THE UNITED STATES

I hereby enter my appearance as counsel for the State of Texas; Mark White, Governor of the State of Texas; and Myra A. McDaniel, Secretary of State for the State of Texas, who are defendants-appellants in the above styled case. I certify that I am a member of the bar of the Supreme Court of the United States.

W. Robert Gray

W. ROBERT GRAY
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-4643

ATTORNEY FOR DEFENDANTS-APPELLANT

W. Robert Gray

W. ROBERT GRAY
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-4643

Subscribed and sworn to before me on this 19th day of September, 1985.

Sylvia A. Rodriguez

NOTARY PUBLIC IN AND FOR
TRAVIS COUNTY, TEXAS

SYLVIA A RODRIGUEZ
Printed Name

My Commission Expires:
3/5/89

APPENDIX C

Statutes and Rules

Federal Statute

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c (1982)

§1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibition set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respcet to which the prohibitions set forth in section 1973(b) of this title based upon determinations made under the second sentence of section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third setence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification. prerequisite, standard, practice, or procedure: *Provided,* That such qualification,

prerequisite, standard, practice, or procedure ma be enforced without such proceeding if the qualification, prerequisite, standard practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or sbdivision to the Attorney General and the Attorney Generai has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information come to his attention during the remainder of the sixty day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

Federal Rules Implementing; Section 5 of the Voting Rights Act of 1965

28 C.F.R. §51.6 (1984) Political subunits

All political subunits within a covered jurisdiction (e.g., continues, cities, school districts) are subject to the requirement of Section 5.

28 C.F.R. §51.14(a) (1984) Enabling legislation and contingent or nonuniform requirements.

(a) The failure of the Attorney General to interpose an objection to legislation: (1) That enables or permits political subunits to institute a voting change or (2) that requires or enables political subunits to institute a voting change upon some future event or if they satisfy certain criteria does not exempt the political subunit itself from the requirement to obtain preclearance when it seeks or is required to institute the change in question, unless implementation by the subunit is explicitly included and described in the submission of such parent legislation.

28 C.F.R. §51.32 (1984) Expedited consideration.

(a) When a submitting authority is required under State law or local ordinance or otherwise finds it ncessary to implement a change within the 60 day period following submission, it may request that the submission be given expedited consideration, The submission should explain why such consideration is needed and provide the date by which a determination is required.

(b) Jurisdictions should endeavor to plan for changes in advance so that expedited consideration will not be required and should not routinely request such consideration. When a submitting authority demonstrates good cause for expedited consideration the Attorney General will attempt to make a decision by the date requested. However, the Attorney General cannot guarantee that such consideration can be given.

(c) Notice of the request for expedited consideration will be given to interested parties registered under § 51.30.

28 C.F.R. §51.48 (1984). Absence of judicial review.

The decision of the Attorney General not to object to a submitted change or to withdraw an objection is not reviewable. However, Section 5 states: "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure."

Provisions of the Texas Election Code

Tex. Elec. Code Ann. art. 1.08c (Vernon Supp. 1985) Limitation on early filing of application for place on ballot.

An application to have the name of a candidate, other than a candidate for the office of precinct chairman, placed on the ballot for any election may not be filed earlier than 30 days before the deadline prescribed by this code for filing the application. An application to have the name of a candidate for the office of precinct chairman placed on the ballot for election may not be filed earlier than 90 days before the deadline prescribed by the code for filing the application. An application filed before that day is void. The secretary of state shall not reimburse county chairmen for any expenses incurred by the early filing of candidates for the office of precinct chairman before the opening of filing for other offices.

Tex. Elec. Code Ann. art. 2.01b (Vernon Supp. 1985) Dates for holding general and special elections

(a) Except as provided in Subsections (b) and (e) of this section, every general (regular) or special election held by the state or by any county, city, school district, water district, or any other political subdivision or agency of this state must be held on one of the following dates: the third Saturday in January, the first Saturday in April, the second Saturday in August, or the first Tuesday after the first Monday in November. Provided, however, that in even-numbered years the only issues which may be submitted to the voters in an election held on the first Tuesday after the first Monday in November shall be the election of state and county officers, the election of officers of a general-law city or town wherein the governing body of said city finds that the religious tenets of more than 50 percent of the registered voters of said city prohibit the adherents from voting in an election held on Saturday, the election of officers of a home-rule city with a population of less than 30,000, according to the last preceding federal census, where such city or town used, prior to 1975, the first Tuesday after the first Monday in November of even-numbered years as the date for the election of its officers, and amendments to the constitution of this state submitted to the voters by the legislature.

This requirement does not apply to runoff elections, political subdivision using the convention method of election, local option elections held under the Alcholic Beverage Code, elections for bonds and elections for school maintenance taxes, to the biennial party primary elections held to nominate candidates for public office, or to confirmation elections, director elections, and maintenance tax elections, held in conjunction with the creation of political subdivisions provided for by Article XVI, Section 59, of the Texas Constitution, which furnish water or sewer services to household users. An election held on an unauthorized date is void.

(b) When a vacancy in office is to be filled at a special election, the election must be called for a date specified in Subsection (a) unless the governor finds the existence of an emergency that warrants calling the election for an earlier date. If the governor orders an emergency election, the election proclamation shall include a statement that identifies the nature of the emergency. An emergency election ordered by the governor may not be held on a day other than Tuesday or Saturday. When the governing body of a political subdivision wishes to call an emergency special election to fill a vacancy, the governing body shall submit a request to the governor for permission to call the election, and the governor may grant permission if he finds that an emergency exists.

(c) In even-numbered years the only issues which may be included on the ballot of the elction held on the first Tuesday after the first Monday in November shall be the election of state and county officers, the election officers, of a general-law city wherein the governing body of said city finds that the religious tenets of more than 50 percent of the registered voters of said city prohibit the adherents from voting in an election held on Saturday, the election of officers of a home-rule city with a population of less than 30,000, according to the last preceding federal census, where such city or town used, prior to 1975, the first Tuesday after the first Monday in November of even-numbered years as the date for the election of its officers, and constitutional amendments submitted to the people by the legislature. The governing body of local political subdivisions shall be allowed to choose for their permanent election day any of the above four election dates. The filing deadline for can-

didates, the dates for canvassing the returns of the election, the date for commencement of terms of office filled at the election, and any other date incidental to the election shall fall on the date that has the same relationship to the date of the election as provided under the preexisting law. Where by preexisting law the terms of office are set to commence on a specified calendar date and the date of the election is changed by this section, the governing board of the political subdivision shall set the date on which the terms begin until otherwise provided by law. A runoff election, when required, shall be held on a date that provides the same time interval with relation to the main election as provided under the preexisting law.

(d) When under the provisions of Subsection (c) the beginning date for a term of office is changed to fall on an earlier date, the current term on the effective date of this section is shortened accordingly, and the holder of the current term shall surrender the office to his successor on the beginning date of the succeeding term or as soon thereafter as the successor has qualified. When the beginning date is changed to fall on a later date, the incumbent in office at the expiration of the current term as set by preexisting law shall continue to perform the duties of the office, as required by Section 17 of Article XVI of the Texas Constitution, until the successor has qualified for the succeeding term.

(e) When a preexisting law requires that a special election be called within a specified time period after the occurrence of a certain event, the election shall be called for a date authorized in Subsection (a) of this section that falls within that time period; or if there is no authorized date within the period that allows sufficient time to comply with other requirements of law, the election shall be called for the first authorized date after its expiration, except that the election shall be called for some other date within the time period where the constitution requires it.

Tex. Elec. Code Ann. art. 4.01. (Vernon Supp. 1985) Proclamation by Governor

Notice shall be given to the people of all elections for State and district officers, electors for President and Vice-president

of the United States, members of Congress, and members of the Legislature. Such notices shall be by proclamation by the Governor ordering the election, not less than thirty-five (35) days before the election, issued and mailed to the several county judges.

Tex. Elec. Code Ann. art. 4.09. §§ 1,2,4,7 (Vernon 1967 & Supp. 1985) Special elections to fill vacancies in public offices.

Section 1. Where special elections are authorized by this Act, the officer authorized by law to order elections shall make such order, fixing the time of the election not less than twenty (20) nor more than ninety (90) days after the first public notice of such order.

Section 2. Election to fill unexpired term. Where vacancies which are to be filled by election occur in a civil office, an election shall immediately be ordered to fill the unexpired term.

* * *

Section 4. Election on resignation of incumbent of unexpired term. When the incumbent of an office, the vacancy of which is to be filled by election, tenders to the officer authorized by law to receive same a written resignation effective at a future date, an election shall be ordered immediately after acceptance of the resignation to elect a successor to the incumbent to fill the term of office unexpired from and after the effective date of the resignation.

* * *

Section 7. Governor may accept resignation. Where no officer is otherwise authorized by law to receive and accept the resignation of an officer, the Governor is hereby designated as the officer to do so and he is hereby empowered and authorized to receive and accept the resignation of all such officers.

Tex. Elec. Code Ann. art. 4.10 (Vernon Supp. 1985) Vacancy; application to get on ballot.

Subdivision 1. (a) Any person desiring his name to appear upon the official ballot at any special election held for the purpose of filling a vacancy, when no party primary has been held, may do so by presenting his application to the proper authority. Such application shall set forth:

(1) The name of the office sought;

(2) His occupation, his postoffice address, and the county of his residence;

(3) His age, place of birth, kind of citizenship, and length of residence in the county and state.

(b) In any special election for a statewide or district office which is regularly filled at the general election for state and county officers, the application shall also set forth the candidate's political party affiliation or shall state that the candidate is not affiliated with any political party.

Subdivision 2. Such application must be filed not later than 5 p.m. of the 31st day before any such special election, and shall not be considered filed unless it has actually been received by the officer with whom it is to be filed.

Subdivision 3. (a) The application must be filed with the Secretary of State in the case of a statewide or district special election. It must be accompanied with a fee of $1,000 for a statewide office, including without limitation the office of United States Senator, a fee of $500 for the district office of United States Representative, a fee of $400 for the district office of State Senator, and a fee of $200 for the district office of State Representative; or, in lieu of the filing fee, the application must be accompanied with a petition signed by at least 5,000 registered voters of the state in the case of a statewide office, and by at least 500 registered voters of the district in the case of a district office. A petition must show the address, voter registration number, and date of signing for each signer. No person may sign the petition of more than one candidate for the same office, and if a person signs the petition of more than one candidate, the signature is void as to all such petitions. A petition may be in multiple parts. To each part, which may consist of one or more sheets, there must be attached the affidavit of some registered voter, giving his address and voter registration number, and stating that each signature appearing in that part of the petition was affixed in the presence of the affiant and that to the best knowledge and belief of the

affiant each signature is genuine and each person signing was a registered voter at the time of signing. A petition so verified is prima facie evidence that the signatures thereon are genuine and that the persons signing it are registered voters. Fees received under this subdivision shall be deposited in the general revenue fund of the state.

(b) Upon receipt of an application which conforms to the above requirements, the Secretary of State shall issue his instruction to the county clerks of the state, or of the district in the case of a district vacancy, directing that the name of the applicant be printed on the official ballot.

(c) The party affiliation of the candidate shall be printed on the official ballot following the name of the candidate. If the candidate has stated in his application that he is not affiliated with any political party, the word "Independent" shall be printed on the ballot following the candidate's name. In other respects, the ballot shall be printed as indicated in Section 61 of this code (Article 6.05, Vernon's Texas Election Code) for a special election in which no party nomination has been made.

Subdivision 4. The application must be filed with the city secretary or clerk in the case of a municipal special election. A home-rule city by charter may require that the application be accompained with a reasonable filing fee or a petition of voters in lieu of the filing fee.

Tex. Elec. Code Ann. art. 4.11. (1)-(4) (Vernon Supp. 1985) Special elections for United States representative

Subdivision 1. In any special election called to fill a vacancy in the office of United States representative in any congressional district of the state, a majority vote of the electors participating in the election shall be necessary for election. In the event no candidate receives a majority of the votes cast at the first election, the Governor shall, within five days after the results of the election are officially declared, call a second election to be held on a specified day which shall be not less than thirty nor more than forty days after the date for the proclamation or order calling the election. In the second special election the candidates shall be limited to the participants in the first election who received the largest and next largest number of votes at the first election.

Subdivision 2. In any special election called to fill a vacancy in the office of United States representative, the commissioners court of each county in such district shall meet within three days after such election is held and canvass the returns thereof.

Subdivision 3. Whenever there shall be held a special election in any congressional district in this state for the election of United States Respresentative, the commissioners court of each county in such district shall meet within three days after such election is held and canvass the return thereof.

Subdivision 4. When a special election shall have been held for United States representative in any district, the county judge of each county in which such election was held shall, within twenty-four hours after the commissioners court opens the returns and canvasses the results, as provided in Subdivision 3 of this section, make out duplicate returns of the election, one of which he shall immediately transmit to the seat of government of the state, sealed in an envelope, directed to the Secretary of State, and endorsed "Election Returns for _____County, for United States Representative, District _____" (filling the first blank with the name of the county and the other blank with the number of the district for which the election was held); and the other of such returns shall be deposited in the office of the county clerk of the county where such election was held. Not later than the seventh day after the election, the day of the election excluded, the Secretary of State, in the presence of the governor and the citizen appointed under Section 120 of this code, shall open and canvass the returns of the election and declare the results thereof. If any person received a majority of the votes cast at the election, the Governor shall immediately make out, sign and deliver a certificate of election to such person for the unexpired term of the office for which he was a candidate. In the event no candidate received a majority of the votes cast at the election, the Governor shall call a second election as provided in Subdivision 1 of this section and the Secretary of State shall within five days after the results of the first election are officially declared, certify to the county clerk of each county in the district the names of the two candidates who are eligible to participate in the second election and the clerks shall make up the ballot for election according to the certificate. The results of the second election shall be canvassed and the results declared in the same manner as herein provided for the first election, and the Gover-

nor shall issue to the candidate who receives the largest number of votes in the second election a certificate of election to the unexpired term of the office for which he was a candidate.

* * *

APPENDIX D

Turner v. Fainter, No. A-83-CA-35 (W.D. Tex. Feb. 8, 1983)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

REV. LEE TURNER, Et Al.,
Plaintiffs,

versus

JOHN FAINTER,
Defendant.
CIVIL ACTION NO. A83CA35

PHIL GRAMM and
CHESTER R. UPHAM, JR.,
Intervenors.

Before WILLIAMS, Circuit Judge, SHANNOR and GARCIA, District judges.

PER CURIAM:

This is a suit to enjoin the holding of the special election scheduled for Saturday, February 12, 1983, in the Sixth Congressional District to fill the vacancy created by the resignation of Representative Phil Gramm on January 5, 1983. The Governor set the special election to take place thirty-eight days after the resignation, finding an emergency under the Texas Election Code. The plaintiffs, voters in the Sixth District, seek a preliminary injunction against the election being held absent a preclearance obtained by the State from the Attorney General of the United States.

Reverand Lee Turner and other plaintiffs filed suit in the United States District Court for the Eastern District of Texas, asserting that the scheduling of the election violated the constitutional rights of minorities under the Fifth, Fourteenth, and Fifteenth Amendments, and was in violation of the Voting Rights Act, 42 U.S.C. § 1973(c), because of a lack of preclearance.

After jurisdiction was denied in the Eastern District of Texas, suit was then brought in the Western District. Judge H.F. Garcia ordered hearing before a three-judge federal court, 28 U.S.C. § 2284 (b)(1).

The parties agreed at oral argument that there are no fact issues before the Court. It is agreed that the Governor was in full compliance with the terms of the Texas Election Code in calling this special election. Eleven candidates have been certified by the Secretary of State to appear on the ballot for this special election.

The Court finds the facts in accordance with these agreed facts.

The calling of this special election by the Governor is in accordance with the past practice of the State of Texas both before and after 1972 or the passage of the 1975, 1977 Election Codes in Texas. It is not for this Court to decide whether the Governor in this case properly decided that such a special election was "an emergency". The statute specifically vests this power in the Governor without limitations upon him in deciding the justification for the declaration of such an emergency. The evidence is also clear that such declarations have been routine matter in special elections to fill congressional vacancies in Texas.

Based upon the facts in this case we are unable to find a "change" in the procedures. Section 1973(c) of the Voting Rights Act requires such a change before preclearance is necessary. The changes that took place with respect to this election took place entirely in the 1975 and 1977 Amendments to the Texas Election Code, and the Attorney General of the United States has given blanket clearance to the provisions of this Code as it relates to the election which is before the Court. We find, for purposes of a preliminary injunction, no necessity for clearance.

Plaintiffs also claim that setting this special election violated their constitutional rights under the Fifth, Fourteenth and Fifteenth Amendments. Their claim is not specific. No actual situations are before the Court. Rather, there is only a general

assertion that the short period of five days which was available to potential candidates to obtain signatures in lieu of a $500 filing fee and available for potential candidates to decide whether or not to run discriminated against minorities. This period of elapsed time is not, however, a change in election procedures.

This election has now been scheduled for over a month. The Texas Election Code authorizes setting such an election thirty-five days or more after the proclamation, and this provision was followed. We find that plaintiffs have made no showing which justifies the drastic remedy of enjoining the holding of this special election. Denial of the injunction does not foreclose plaintiffs raising issues involving the legality of this election. If there are issues as to the legality of the election, they can be litigated after the election is held. *Cf. Berry v. Doles,* 438 U.S. 190 (1978).

In view of our legal conclusions, this three-judge federal district court exercising its jurisdiction under 42 U.S.C. § 2284(b)(1), holds as follows:

Plaintiffs' prayer for an injunction enjoining the holding of the special election on February 12, 1983, is DENIED.

APPENDIX E

Texas's Brief in Opposition to Motion for Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff	§	
	§	
V.	§	**CIVIL ACTION NO. SA-85-CA-2199**
	§	
	§	
STATE OF TEXAS; MARK WHITE, GOVERNOR OF THE STATE OF TEXAS; MYRA A. McDANIEL, SECRETARY OF STATE OF THE STATE OF TEXAS,	§	
	§	
Defendants.	§	

DEFENDANTS' BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

TO THE HONORABLE COURT:

I. Introduction

The federal government seeks a preliminary, mandatory injunction to force the State of Texas to submit within five days three alleged "voting changes" for review under Section 5 of the Voting Rights Act.[1] The government seeks this injunction before a trial on the merits but after all alleged voting changes have taken place. Such relief is improper and unprecedented.[2]

---

1. The government curiously does not seek to enjoin the run-off election scheduled for August 3, 1985.

2. The government does not cite a single case in which a preliminary injunction ordering a state to seek preclearance has been granted.

Properly granted a preliminary injunction is designed to protect the court's jurisdiction by preserving the status quo. *Middleton-Keirn v. Stone*, 655 F.2d 609 (5th Cir. 1981). A preliminary injunction here would have the contrary result. By attempting to force Texas to submit its special election for preclearance prior to trial on the merits, the government seeks to obtain what would constitute final resolution of the controversy through preliminary procedures. Thus, a preliminary injunction would render this case moot, thereby depriving the court of jurisdiction instead of preserving it.

In addition to preserving the status quo, a preliminary injunction may be granted upon consideration of four factors:

(1) a substantial likelihood of success on the merits;

(2) a substantial threat of irreparable injury if the injunction is not issued;

(3) that the threatened injury to the movant outweighs any damage the injunction might cause to the opponent; and

(4) that the injunction will not disserve the public interest.

Enterprise International, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 471 and n. 24 (5th Cir. 1985). The government has not met its burden on any of the four factors.

II. The Government Is Not Likely to Succeed On The Merits.

A. Texas Has Implemented No "Change" Within the Meaning of Section 5.

The government alleges that Texas has implemented three "changes" within the meaning of Section 5 of the Voting Rights Act. These alleged "changes" as described by the government consist of the following:

(1) the establishment of a shortened candidate qualification period ending on May 29, 1985;

(2) the selection of June 29, 1985 for the first special election; and

(3) the selection of August 3, 1985 for the second (runoff) special election.

The method of selecting the above dates reflects well-established Texas election practice which pre-dates the Voting Rights Act. Therefore, preclearance of the above procedures is inappropriate under the terms of Section 5.

The federal Constitution requires that the "executive authority" in each state call a special election to fill such a vacancy. U.S.C.A., Const. Art. I, §2, cl. 4. Federal law provides that the time and manner for holding the election be prescribed by State law. 2 U.S.C.A., §8. Texas law authorizes the Governor to call special elections pursuant to the following provisions:

1. Art. 4.01 of the Texas Elec. Code which requires notice be issued by proclamation of the governor on or before the 36th day before the election;

2. Art. 4.09 of the Texas Elec. Code which provides that special elections to fill vacancies be called for date not less than 20 nor more than 90 days after the first notice of the election order;

3. Art. 4.10 of the Texas Elec. Code which establishes that a candidate must file not later than thirty days before a special election;

4. Art. 4.11 of the Texas Elec. Code which governs special elections to fill vacancies in the office of United States Representative; and

5. Art. 2.01(b) of the Texas Elec. Code which requires that a special election be called on one of four uniform dates specified in subsection (a) of that article, unless the governor declares an emergency and calls the election for a date pursuant to his general powers under art. 4.01 *et seq.*

Arts. 4.01 and 4.09 were included in the Election Code when it was originally enacted by the 52nd Legislature in 1951. Both arts. 4.01 and 4.09 were amended in 1981 to delete obsolete language. The Civil Rights Division of the U.S. Department of Justice notified the Secretary of State of Texas that the Attorney General interposed no objection to these changes on August 8, 1981 and September 8, 1981, respectively.

Art. 2.01b was enacted in 1975 and again in 1977. It received Justice Department preclearance on December 15, 1975 and again on August 22, 1977. Article 2.01b has two main effects. These are: 1) to require political subdivisions to hold their general elections on uniform dates statewide; and 2) to limit special elections to uniform dates, absent the finding of an emergency by the governor. In this latter respect, art. 2.01b serves to narrow, rather than to expand, the pre-existing authority of the Governor in setting the dates for special election. In 1983 art. 2.01b was amended to narrow further the Governor's authority in this respect by limiting election dates in emergency situations to Tuesdays and Saturdays. The 1983 amendment was seen as an additional step in accomplishing the goals of art. 2.01b as stated above. The 1983 amendment was strongly endorsed by minority groups throughout Texas, and was precleared by the Justice Department on July 12, 1983.

The date for a runoff election is governed by art. 4.11 of the Texas Election Code. Art. 4.11 of the Texas Election Code. Art. 4.11 was enacted in 1961 and subsequently amended in 1967 and is not subject to preclearance.

Since the procedures for calling special elections to fill vacancies and setting the date for those elections were in existence before November 1, 1972, or were precleared, there is no requirement to make a submission to the U.S. Attorney General concerning these procedures.

Apparently, the government contends that it reversed certain "changes" from preclearance in its letters of 1975 and 1977 concerning H.B. 275 (1975) and H.B. 443 (1977). Actually, the letters unequivocally preclear each version of Art. 2.01b without reservation but expresses the Attorney General's opinion concerning the submissibility of changes in election dates made

by political subdivisions. Assuming, however, that the language in the letter constitutes a reservation of the Attorney General's approval, by its very language any government reservation related only to dhanges in the annual or biannual general election date selected by local political subdivisions pursuant to Art. 2.01b(c) which authorizes such changes. Clearly such changes are subject to preclearance. The Attorney General did not challenge the well established procedures used by the Governor to fill vacancies in public office.

B. This Case is Controlled By Turner v. Fainter

In *Turner v. Fainter,* Civ. No. A83CA35 (W.D. Tex., Feb. 8, 1983), a three-judge court was asked to consider a voting rights challenge identical to the instant case. The election considered in *Turner* was an election to fill a vacancy in the Office of U.S. Representative, District 6. This vacancy was created by the resignation of then Congressman Phil Gramm on January 5, 1983. The election in *Turner* was called 38 days before the date set for the election. In both *Turner* and the instant case the Governor declared an emergency under the authority granted him by articles 2.01b and 4.09 of the Election Code, and ordered the election to be held earlier than the next uniform election date.

The court found that the calling of the special election was in accordance with past practice of the State of Texas, both before and after the State came under the preclearance provisions of the Voting Rights Act. The court stated that the statute specifically vested in the Governor the power to declare an emergency, without limitation, and that the evidence was clear that such declarations had been routine in calling special elections to fill congressional vacancies.

Not only was the court unable to find that the calling of the election constituted a "change" that required preclearance, but stated that in its opinion the Justice Department had given blanket clearance to the provisions of article 2.01b that permit the Governor to determine that an emergency exists.

The government relies on two cases to argue that the holding in *Turner* should be overturned: *NAACP v. Hampton County Election Commission*, _____U.S._____, 53 U.S.L.W. 4207 (U.S., Feb. 27, 1985) and *Garcia v. Guerra*, 744 F.2d 1159 (5th Cir. 1984), *cert. denied* No. 84-1367 (April 29, 1985). In *NAACP v. Hampton*, the Supreme Court addressed *new* legislation combined with unprecedented procedures which were subject to preclearance. the issue in *Hampton* was whether changes in the election date and filing deadline which were not authorized by any statutory procedures or established practices were subject to preclearance and the Court found that they were.

In *Garcia*,[3] the Court held that even though all four uniform election dates had been precleared under Section 5 of the Voting Rights Act, a school district must make a submission to utilize one of the uniform dates different from that which has traditionally been used. The Court found at page 1165 ". . . the established fact in this case is that abandoning the usual April date for school elections for the August date was a "change" which had the effect of depriving substantial numbers of Hispanic voters of the right to vote in the election."

Hampton and *Garcia* are consistent with the court's reasoning in *Turner*. When a date is chosen outside of any past practice or statutorily authorized procedure, the change is submissible. *NAACP v. Hampton County, supra*. When a date different from the traditional time is chosen for a regular school district election, the change is submissible. *Garcia v. Guerra, supra*. If there is a change in the traditional and statutory processes flowing from a vacancy in office, the change is submissible. *Turner v. Fainter, supra*. The *Turner* Court could find no changes when the Governor continued to choose dates within the established constraints and procedures of Texas law. In the case at bar, the Governor's actions are typical of past practice as may be proven upon a trial on the merits. His actions are not submissible under Section 5 of the Voting Rights Act. Therefore, it is not probable that the government will prevail on the merits.

---

3. The Court addressed what it believed to be a regular, reoccurring election traditionally held in April, when, in fact, the election was a one-time special election. The State of Texas was not a party.

II. The Government Can Show No Irreparable Harm If The Preliminary Injunction Is Not Granted.

The government blatantly fails to assert that any injury will be suffered by it or any others if relief is not granted. (Memorandum in Support, pp. 17-18). Instead, the government argues that irreparable injury is presumed as a matter of law where there is a clear violation of a statutory mandate and where injunctive relief is statutorily authorized. The government relies on *United States v. Hayes International Corp.*, 415 F.2d 1038 (5th Cir. 1969), and other civil rights cases involving "a pattern and practice of employment discrimination on account of race." *Id.* at p. 1045.

The government has cited no Voting Rights Act cases which dispose of the requirement of establishing irreparable harm. The civil rights cases are not applicable because of the distinction in the character of conduct addressed by each Act. Under the Civil Rights Act of 1964, specific conduct which is deemed to be harmful to a protected class if prohibited; each of the cases cited by the government involved allegations of actual injury necessitating preliminary relief. The structure of Section 5 of the Voting Rights Act, however, is prophylactic. The prohibited counduct is not the ultimate evil to be prevented. That is, the administration of changes in election practices or procedures prior to preclearance does not necessarily work any evil to a protected class. In fact, the complaint filed by the government in this case does not allege actual harm to any class of persons protected under the Voting Rights Act.

The Supreme Court holding in *NAACP v. Hampton County, supra*, is further support that the failure to submit, alone, can never form the basis for preliminary injunction. The Court determined that the validity of an election need not necessarily be disturbed by the Courts if the Attorney General determines *after* an election that changes had no discriminatory purpose or effect. If, on the other hand, under a post election submission it is determined by the Attorney General that the state has failed to meet its burden under Section 5 proceedings to establish the absence of discriminatory purpose or effect, and interposes his objection to the proposed change, the results of the election can be set aside. *Id* at p. 1138. (The government

has effectively conceded this point by seeking a submission after the June 29, 1985 election.) Therefore, the government suffers no irreparable harm by awaiting final determination of the merits by this Court.

III. Potential Harm to Texas is Grave and Relief Sought by the Government is Not Necessary to Serve Purposes of Voting Rights Act

The government's assertion that the relief sought would require Texas "only to draft a simple letter describing the changes and send it to the Attorney General" is disingunous. On the contrary, such submission would provide the Attorney General with at least 60 days in which to review the subject matter of the submission. The submitted procedures could not be enacted until notification was received from the Attorney General that no objection was being interposed. 42 U.S.C.A. 1973c. While the plaintiff has asserted that any submission could be expeditiously reviewed, such an assertion is purely gratuitous. The Attorney General is bound by no law or rule to make any determiniation any sooner than 60 days after receipt of the submission.

If Texas submits the holding of this election for preclearance, that submission will serve as precedent under which the Justice Department will require submission of every election date the Governor sets pursuant to the Governor's extant authority under state and federal law. The scope of such relief would effect a major administrative burden on Texas and upon all other jurisdictions covered by Section 5. The legal principle at stake extends to much more than an election ordered by the Governor to fill a congressional vacancy. This issue has direct implications for all other special elections called by covered jurisdictions, including all proposition elections.

Vacancies in the offices of congressman, state senator or state representative are not uncommon. Between 1966 and November 1972, when Texas came under the Voting Rights Act, 2 congressional vacancies and 18 legislative vacancies were filled using this procedure. Since Texas came under the Act, 4 congressional vacancies and 42 legislative vacancies have been filled using this procedure. Preclearing the dates of the

elections to fill these vacancies would leave the offices vacant for three to six months. Other political subdivisions would be affected as well. A city council, without a quorum because of resignations or deaths or removal of officers, that asks the Governor to order an emergency special election so it can conduct business, will be unable to conduct business until the election date is precleared, which could mean a delay of, again, three to six months. Effectively, the requirement of preclearance will abrogate the Governor's authority to call an emergency special election under article 2.01(b), and certainly the requirement will seriously hamper the ability of the State and other political subdivisions to conduct business, by prolonging the period without representation.

The sought relief would additionally effect a major hardship upon the voters of the 1st Congressional district of Texas. The voters of the 1st congressional District have a right to representation in the U.S. Congress. The State of Texas has undertaken the proper legal and administrative steps to restore such representation to the voters of the 1st Congressional District. The sought relief would preclude the conduct of the procedures necessary for the restoration of congressional representation to the 1st Congressional District for the time necessary for the Attorney General's review, a period which may take as long as 120 days (if additional information is requested), not including the time required for preparation and transmission of the submission.

IV. Public Interest Requires No Interruption in Election Process Currently Underway

The government alleges that the public interest requires the granting of preliminary relief. On the contrary, the public interest requires that the elction procedures already in progress continue without interruption. The government's attempt at this time to cast a cloud over the election procedures which have been underway since May 24, 1985, can only have the effect of undermining public confidence in the election procedures, confusing voters as to the scheduling of the elections, and reducing voter turnout. The government's obvious interest in seeking only the most formal of submissions (see, Memorandum in Support, p. 19) precludes any argument that relief is necessary to accomplish the goals of the Voting Rights Act.

Conclusion

For the foregoing reasons, the State of Texas respectfully requests the Motion for Preliminary Injunction be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant Attorney General for Litigation

MARY F. KELLER
Special Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-1761

On the Brief:

Robert L. Lemens
Assistant Attorney General

Karen Gladney
Special Assistant
Elections Division
Secretary of State

John Steiner, Attorney
Elections Division
Secretary of State

CERTIFICATE OF SERVICE

I hereby certify that the Defendant's Brief in Opposition to Motion for Preliminary Injunction was hand-delivered to Mr. Steven Rosenbaum, Attorney, Voting Section, Civil Rights Division on August 1, 1985.

_____

MARY F. KELLER

APPENDIX F

Selected Exhibits from the Record of the August 1, 1985, Hearing before the District Court.

(In some instances not all the documents constituting an exhibit are shown.)

JSP:JM:peb
DJ 166-012-3
X0548

DEC 8

Mr. John F. Pettit
General Counsel
Office of the Secretary of State
State of Texas
Austin, Texas 78711

Dear Mr. Pettit:

This is in reference to House Bill 273, consolidating election days in the State of Texas, which was submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965. Your submission was received on November 20, 1975. In accordance with your request, expedited consideration has been given to this submission pursuant to the procedural guidelines for the administration of Section 5 (28 C.F.R. 51.22).

The Attorney General does not interpose an objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that our failure to object does not bar any subsequent action to enjoin the enforcement of this act should such action become necessary.

In reference to your request that your submission be considered a blanket submission for all political subdivisions in Texas, the submission is

GOVERNMENT EXHIBIT 4 SA85CA299

considered a blanket submission for those changes which are mandated by H.B. 775. Where H.B. 775 merely authorizes political subdivisions to make changes, i.e., Section 1a (where the governing body of political subdivisions whose elections fall in October or November may choose any of the four (4) dates) and Section 2, the changes would fall under Section 5 of the Voting Rights Act separately as the changes occur.

Sincerely,

J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

DSU:CRS:EF:hmp
DJ 166-012-3
A1477

AUG 22 1977

Honorable Mark White
Secretary of State
State of Texas
Capitol Station
Austin, Texas 78711

Attention: Ms. Karen C. Gladney
Elections Division

Dear Mr. Secretary:

This is in reference to House Bill 443 of the 1977 Texas Legislature, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on June 30, 1977. Although we noted your request for expedited consideration, we were unable to comply.

The Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change.

We wish to remind you that any changes in election date made pursuant to House Bill 443 (1977) are subject to the preclearance requirements of Section 5.

Sincerely,

[redacted] B. [redacted] III
Assistant Attorney General
Civil Rights Division

By:

[redacted] W. JONES
Chief, Voting Section

WBR:SSC:QJ:gml
DJ 166-012-3
H1717

July 12, 1983

Honorable John W. Fainter, Jr.
Secretary of State of Texas
Elections Division
Post Office Box 12887
Austin, Texas 78711

Dear Mr. Secretary:

This is in reference to House Bill No. 166 (1983), which limits to Tuesdays and Saturdays the days on which an emergency special election may be called by the Governor under V.A.T.S. Election Code, art. 2.01b(b) and requires the Governor to include in his proclamation a statement that identifies the nature of the emergency in the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on May 13, 1983.

The Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.48).

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By:

Gerald W. Jones
Chief, Voting Section

The State of Texas

SECRETARY OF STATE

I, DUANE E. CROWLEY, ASSISTANT SECRETARY OF STATE OF THE STATE OF TEXAS, DO HEREBY CERTIFY that the attached is a true and correct summary of special elections conducted to fill congressional and legislative vacancies in Texas from January 1966 through the present.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this 31st day of July, 1985.

DUANE E. CROWLEY
ASSISTANT SECRETARY OF STATE

SPECIAL ELECTION PROCLAMATIONS

Governor	Proclamation No.	Date of Pro.	Date of Election	Type	Filing Deadline	Time Between Proclamation and Deadline	Day
Connally	41-1105	2-19-66	3-26-66	U.S. Cong. Dist. 8	2-23-66	4 da.	Sat.
Connally	41-1136	11-30-66	1-7-67	St. Rep. Dist. 35 Pl.2	12-7-66	7 da.	Sat.
Connally	41-1148	4-18-67	5-25-67	St. Rep. Dist. 20F	4-24-67	6 da.	Thur.
Connally	41-1199	7-19-67	11-11-67	St. Rep. Dist. 22 Pl.7	10-12-67	3 mo.	Sat.
Connally	41-1200	8-7-67	11-11-67	St. Rep. Dist. 24 Pl.2	10-11-67	2 mo.	Sat.
Connally	41-1204	8-17-67	11-11-67	St. Rep. Dist. 47 Pl.2	10-11-67	2 mo.	Sat.
Connally	41-1206	8-25-67	11-11-67	St. Rep. Dist. 30	10-11-67	2 mo.	Sat.
Connally	41-1207	8-29-67	11-11-67	St. Sen. Dist. 8	10-11-67	2 mo.	Sat.
Connally	41-1208	8-30-67	11-11-67	St. Rep. Dist. 75	10-11-67	1 mo. 10 da.	Sat.
Connally	41-1213	10-2-67	11-11-67	St. Rep. Dist. 39 Pl.2	10-11-67	9 da.	Sat.
Connally	41-1244	3-29-68	5-14-68	St. Rep. Dist 23 Pl.1	4-13-68	15 da.	Tue.

Governor	Proclamation No.	Date of Pro.	Date of Election	Type	Filing Deadline	Time Between Proclamation and Deadline	Day
Connally	41-1245	3-29-68	5-14-68	St. Rep. Dist. 48F	4-13-68	15 da.	Tue.
Connally	41-1246	3-29-68	5-14-68	St. Rep. Dist. 33 Pl.4	4-13-68	15 da.	Tue.
Connally	41-1254	5-13-68	6-18-68	St. Rep. Dist. 33 Pl.5	5-18-68	5 da.	Tue.
Connally	41-1257	7-19-68	8-24-68	U.S. Cong. Dist. 3	7-24-68	5 da.	Sat.
Connally	41-1273	1-18-69	2-11-69	St. Rep. Dist. 49			Sat.
Smith	41-1342	6-30-69	7-22-69	St. Rep. Dist. 73			Tue.
Smith	41-1453	3-22-72	6-13-72	St. Rep. Dist. 9 Pl.4	5-13-72	2 mo.	Tue.
Smith	41-1457	4-28-72	6-6-72	St. Sen. Dist. 24	5-6-72	8 da.	Tue.
Smith	41-1461	8-3-72	9-16-72	St. Rep. Dist. 46 Pl.3	8-16-72	13 da.	Sat.
Briscoe	41-1476	6-7-73	7-17-73	St. Sen. Dist. 14	6-16-73	9 da.	Tue.
Briscoe	41-1477	6-12-73	7-17-73	St. Rep. Dist. 37 Pl.3	6-16-73	4 da.	Tue.
Briscoe	41-1517	3-15-74	4-20-74	St. Rep. Dist. 84	3-20-74	5 da.	Sat.

Governor	Proclamation No.	Date of Pro.	Date of Election	Type	Filing Deadline	Time Between Proclamation and Deadline	Day
Briscoe	41-1525	12-20-74	1-11-75	St. Sen. Dist. 6	12-24-74	4 da.	Sat.
Briscoe	41-1526	12-20-74	1-11-75	St. Rep. Dist. 96	12-24-74	4 da.	Sat.
Briscoe	41-1566	1-23-76	2-28-76	U.S. Cong. Dist. 22	1-28-76	5 da.	Sat.
Briscoe	41-1567	1-23-76	2-28-76	St. Sen. Dist. 7	1-28-76	5 da.	Sat.
Briscoe	41-1568	1-23-76	2-28-76	St. Rep. Dist. 97	1-28-76	5 da.	Sat.
Briscoe	41-1569	1-23-76	2-28-76	St. Rep. Dist. 80	1-28-76	5 da.	Sat.
Briscoe	41-1577	3-25-76	6-19-76	U.S. Cong. Dist. 1	5-19-76	2 mo.	Sat.
Briscoe	41-1586	7-2-76	8-7-76	St. Rep. Dist. 57E	7-7-76	5 da.	Sat.
Briscoe	41-1589	7-9-76	8-14-76	St. Rep. Dist. 90	7-14-76	5 da.	Sat.
Briscoe	41-1604	6-9-77	7-16-77	St. Rep. Dist. 33D	6-15-77	6 da.	Sat.
Briscoe	41-1643	9-14-77	11-8-77	St. Rep. Dist. 37B	10-8-77	26 da.	Tue
Briscoe	41-1645	9-14-77	11-8-77	St. Sen. Dist. 31	10-8-77	26 da.	Tue.

Governor	Proclamation No.	Date of Pro.	Date of Election	Type	Filing Deadline	Time Between Proclamation and Deadline	Day
Briscoe	41-1646	9-14-77	11-8-77	St. Rep. Dist. 71	10-8-77	26 da.	Tue.
Briscoe	41-1648	10-3-77	11-8-77	St. Rep. Dist. 33-0	10-8-77	5 da.	Tue.
Briscoe	41-1658	12-15-77	2-18-78	St. Sen. Dist. 3	1-18-78	34 da.	Sat.
Briscoe	41-1659	12-15-77	2-18-78	St. Rep. Dist. 4	1-18-78	34 da.	Sat.
Briscoe	41-1661	1-3-78	2-18-78	St. Rep. Dist. 5	1-18-78	15 da.	Sat.
Briscoe	41-1662	1-5-78	2-18-78	St. Rep. Dist. 25	1-18-78	13 da.	Sat.
Briscoe	41-1699	12-15-78	1-6-79	St. Rep. Dist. 56	12-20-78	5 da.	Sat.
Clements	41-1708	5-25-79	6-30-79	St. Rep. Dist. 99	5-30-79	5 da.	Sat.
Clements	41-1768	12-14-79	1-19-80	St. Rep. Dist. 87	12-19-79	5 da.	Sat.
Clements	41-1770	1-3-80	2-7-80	St. Rep. Dist. 80	1-7-80	4 da.	Thur.
Clements	41-1782	10-17-80	11-22-80	St. Rep. Dist. 63	10-22-80	5 da.	Thur.
Clements	41-1786	12-15-80	1-10-81	St. Rep. Dist. 83	12-19-80	4 da.	Sat.

Governor	Proclamation No.	Date of Pro.	Date of Election	Type	Filing Deadline	Time Between Proclamation and Deadline	Day
Clements	41-1788	1-9-81	2-10-81	St. Sen. Dist. 27	1-14-81	5 da.	Tue.
Clements	41-1790	1-16-81	2-10-81	St. Rep. Dist. 57-C	1-21-81	5 da.	Tue.
Clements	41-1792	3-4-81	3-31-81	St. Rep. Dist. 50	3-9-81	5 da.	Tue.
Clements	41-1844	10-29-81	12-5-81	St. Rep. Dist. 57F	11-4-81	6 da.	Sat.
Clements	41-1853	4-28-82	5-22-82	St. Rep. Dist. 7	5-3-82	5 da.	Sat.
Clements	41-1870	10-1-82	11-6-82	St. Sen. Dist. 18 unexpired term	10-6-82	5 da.	Sat.
Clements	41-1874	11-23-82	12-15-82	St. Sen. Dist. 18 full term	11-28-82	5 da.	Wed.
Clements	41-1875	11-23-82	12-15-82	St. Rep. Dist. 32	11-28-82	5 da.	Wed.
Clements	41-1877	1-5-83	2-12-83	U.S. Cong. Dist. 6	1-12-83	7 da.	Sat.
White	41-1937	10-11-83	11-19-83	St. Rep. Dist. 115	10-19-83	8 da.	Sat.
White	41-1941	1-20-84	4-7-84	St. Rep. Dist. 49	3-7-84	1 mo. 18 da.	Sat.

Governor	Proclamation No.	Date of Pro.	Date of Election	Type	Filing Deadline	Time Between Proclamation and Deadline	Day
White	41-1942	1-24-84	4-7-84	St. Rep. Dist. 91	3-7-84	1 mo. 14 da.	Sat.
White	41-1943	1-24-84	3-10-84	St. Rep. Dist. 14	2-8-84	15 da.	Sat.
White	41-1948	2-17-84	3-24-84	St. Rep. Dist. 73	2-22-84	5 da.	Sat.
White	41-1949	2-17-84	3-24-84	St. Rep. Dist. 15	2-22-84	5 da.	Sat.
White	41-1951	3-22-84	4-28-84	St. Rep. Dist. 33	3-28-84	6 da.	Sat.
White	41-1982	3-27-85	4-27-85	St. Sen. Dist. 6	4-1-85	5 da.	Sat.
White	41-1985	5-24-85	6-29-85	U.S. Cong. Dist. 1	5-29-85	5 da.	Sat.
White	41-1990	6-10-85	8-10-85	St. Rep. Dist. 140	7-10-85	1 mo.	Sat.

Supreme Court, U.S.
FILED
NOV 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF TEXAS; MARK WHITE, GOVERNOR OF THE STATE OF TEXAS; AND MYRA A. McDANIEL, SECRETARY OF STATE OF THE STATE OF TEXAS,

Appellants

vs.

THE UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Western District of Texas

---

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

JIM MATTOX
Attorney General of Texas

W. ROBERT GRAY
Assistant Attorney General
and Attorney of Record

DAVID R. RICHARDS
Executive Assistant
Attorney General
for Litigation

ROBERT L. LEMENS
Assistant Attorney General

MARY F. KELLER
Special Assistant
Attorney General

Supreme Court Building
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-4643

Attorneys for Appellants

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APPENDIX A

Opinion of the Court Below

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**Civil Action No. SA-85-CA-2199**
v.	)	
STATE OF TEXAS; MARK WHITE, GOVERNOR OF THE STATE OF TEXAS; MYRA A. McDANIEL, SECRETARY OF STATE OF THE STATE OF TEXAS,	)	
Defendants.	)	

Before REAVLEY, Circuit Judge, GARCIA and NOWLIN, District Judges.

PER CURIAM:

The United States is seeking an order requiring Texas to submit its emergency election plan to the Attorney General as provided by section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1982).

On May 24, 1985, former Congressman Hall resigned as Representative of the First Congressional District of Texas and Governor White, exercising the discretion granted him by Tex. Elec. Code § 2.01b (Vernon Supp. 1985), called for an emergency special election with a candidate qualification period ending on May 29, 1985 and a special election on June 29, 1985. Had Governor White not declared an emergency, the Texas Election Code provided that the candidate qualification period would have been from June 10 to July 10, 1985, Tex. Elec. Code §§ 1.08c, 4.10(2) (Vernon Supp. 1985), and the special election would have been on August 10, 1985, Tex. Elec. Code §§ 2.01b(a), (b) & (e), 4.09(1), (4) (Vernon 1967 & Supp. 1985). Because no candidate received a majority in the emergency

special election on June 29, 1985, Governor White, pursuant to Tex. Elec. Code § 4.11(1) (Vernon Supp. 1985), scheduled a runoff election for Saturday, August 3, 1985.

On June 27, 1985, two days before the emergency special election, the United States notified Texas that the emergency special election had to be precleared and offered to process the submission within twenty-four hours of receipt. Texas responded that the setting of the dates under the precleared statute was not a change and therefore did not need to be precleared again, citing *Turner v. Fainter*, No. A83CA35 (W.D. Tex. Feb. 8, 1983).

This court is required to determine whether the emergency special election plan adopted by Texas is a change in voting procedures that has not been precleared. *United States v. Board of Supervisors*, 429 U.S. 642, 645-46, 97 S.Ct. 833, 835, 51 L.Ed.2d 106 (1977). The United States argues that the establishment of a shortened candidate qualification period, the selection of June 29, 1985 for the emergency special election, and the selection of August 3, 1985 for the runoff election were changes that have not been precleared. Texas replies that it follows the decision of the court in *Turner v. Fainter*, No. A83CA35 (W.D. Tex. Feb. 8, 1983) (unpublished), which held that the calling of emergency special elections as provided by a Texas statute that had been precleared did not amount to a change that required preclearance. We believe that the development of this record by the United States and recent Supreme Court teaching requires us to take a different view than did the *Turner v. Fainter* panel.

To determine whether an enactment or administration of a voting procedure triggers the preclearance requirement of section 1973c, the court must determine whether it has a potential for discrimination. *Daugherty County v. White*, 439 U.S. 32, 42, 99 S.Ct. 368, 374, 58 L.Ed.2d 269 (1978). The Court has held that changing election dates and qualification periods have the potential for discrimination. *See N.A.A.C.P. v. Hampton County Election Commission*, _____U.S._____, _____, 105 S.Ct. 1128, 1134-35, _____L.Ed.2d_____ (1985). Here, the wide manipulation of the dates of candidate qualification and of voting—*possible* under the emergency provision of the Texas election law—provide a potential for discrimination. Therefore,

any variation from the election dates stated in the statute, having a potential for discrimination, must be precleared.

The State shows that the practice, preexisting the November 1, 1972 date when Texas became subject to the Act, was for Texas governors to call special elections to fill vacant congressional seats in the same manner followed in this instance. However, the fact remains that no dates are set and that there is no requirement under Texas law to prevent discretion being exercised in a manner that would adversely impact voters protected by the Act. Preexisting *specific* procedures and practices need not be precleared, but the preexisting exercise of discretion to schedule election dates at will cannot be perpetuated without destroying the Voting Rights Act.

Nor do we agree with the State's contention that preclearance of the election code carried with it approval by the Attorney General of whatever emergency election schemes were subsequently ordered by the state election official. The construction of the Attorney General's prior action is made clear by his appearance in this case as well as by Department of Justice regulations:

> Enabling legislation and contingent or nonuniform requirements.
>
> (a) The failure of the Attorney General to interpose an objection to legislation: (1) That enables or permits political subunits to institute a voting change or (2) that requires or enables political subunits to institute a voting change upon some future event or if they satisfy certain criteria does not exempt the political subunit itself from the requirement to obtain preclearance when it seeks or is required to institute the change in question, unless implementation by the subunit is explicitly included and described in the submission of such parent legislation.

28 C.F.R. § 51.14(a) (1984).

Since the election plan already implemented must be cleared for the runoff election set for August 3, 1985, to have any

effect, it is immaterial that section 4.11(1) of the Texas Election Code preexisted 1972.

It is therefore necessary for the Attorney General or other appropriate official of Texas to obtain clearance of the special election scheme for the election to be valid. That clearance may be made after the fact of the election in some cases. *N.A.A.C.P. v. Hampton County Election Commission*, _____U.S._____, 105 S.Ct. 1128, 1138, _____L.Ed.2d_____ (1985). The Attorney General assures the court that, if the State submits its plan today, it will likely receive a response tomorrow—in advance of the election on the following day. By that means the election may proceed without anyone's decision being affected by the outcome of the election.

This court orders the defendants, or any of them, to submit the special election scheme to the United States Attorney General. This shall be done today. If not done today, the court will not enjoin or void the election. The defendants may submit the election scheme to the Attorney General by August 9, 1985. If, by August 15, 1985, the Attorney General's approval is given, no further relief will be ordered and the election results will stand. If, however, the defendants do not submit the election plan to the Attorney General by August 9, 1985, the election will be declared void.

We decide that the defendants have been in good faith in not seeking preclearance and in relying on the *Turner v. Fainter* decision and that there would be no cause to set aside the election if the defendants comply with the present order. *See Hampton County Election Commission*, _____U.S. at_____n.36, 105 S.Ct. at 1138 n.36, _____L.Ed.2d at_____n.36.

IT IS SO ORDERED.

APPENDIX B

Notice of Appeal and Related Documents

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee	)	
	)	
VS.	)	**CIVIL ACTION NO. SA-85-CA-2199**
	)	
THE STATE OF TEXAS, *et al.,*	)	
Defendants-Appellees.	)	

NOTICE OF DIRECT APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. §2101(b)(1982) and Sup. Ct.R. 10, the State of Texas, its Governor Mark White, and its Secretary of State Myra A. McDaniel file this Notice of Appeal of the order and holding of the District Court in the above styled case, entered on August 1, 1985. Appeal is taken directly to the United States Supreme Court pursuant to 42 U.S.C. §1973c (1984). Service is being made at the time of this filing on the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530. Proof of service is attached.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas
and Attorney for Appellants

By:_____
W. ROBERT GRAY
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee	)	
	)	
VS.	)	**CIVIL ACTION NO. SA-85-CA-2199**
	)	
THE STATE OF TEXAS, *et al.,*	)	
Defendants-Appellees.	)	

PROOF OF SERVICE

Pursuant to Sup. Ct. R. 28.4(a), I certify that on the 19th day of September, 1985, one copy of the Appellants' Notice of Direct Appeal to the U.S. Supreme Court of the District Court's Order and Opinion of August 1, 1985, in the above case was mailed by depositing it in U.S. Postal facilities, first-class postage prepaid, both to (1) the Solicitor General of the United States, U.S. Department of Justice, Washington, D.C. 20530, and to (2) Steven H. Rosenbaum, Attorney, Voting Section, Civil Rights Section, U.S. Department of Justice, Washington, D.C. 20530.

All parties required by Sup. Ct. R. 28.4(a) to be served have been served.

I am a member of the bar of the U.S. Supreme Court. My entry of appearance before that Court in this case is attached.

W. ROBERT GRAY
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 7871
(512) 475-4643

Subscribed and sworn to before me on this 19th day of September, 1985.

NOTARY PUBLIC IN AND FOR
TRAVIS COUNTY, TEXAS

Printed Name

My Commission Expires:
3/5/89

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee	)	
	)	
VS.	)	**CIVIL ACTION NO. SA-85-CA-2199**
	)	
THE STATE OF TEXAS, *et al.,*	)	
Defendants-Appellees.	)	

ENTRY OF APPEARANCE OF COUNSEL BEFORE THE SUPREME COURT OF THE UNITED STATES

I hereby enter my appearance as counsel for the State of Texas; Mark White, Governor of the State of Texas; and Myra A. McDaniel, Secretary of State for the State of Texas, who are defendants-appellants in the above styled case. I certify that I am a member of the bar of the Supreme Court of the United States.

W. ROBERT GRAY
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 7871
(512) 475-4643

ATTORNEY FOR
DEFENDANTS-APPELLANT

APPENDIX C

Statutes and Rules

Federal Statutes

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c (1982)

§1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibition set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respcet to which the prohibitions set forth in section 1973(b) of this title based upon determinations made under the second sentence of section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third setence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification,

prerequisite, standard, practice, or procedure ma be enforced without such proceeding if the qualification, prerequisite, standard practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or sbdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information come to his attention during the remainder of the sixty day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

Federal Rules Implementing; Section 5 of the Voting Rights Act of 1965

28 C.F.R. §51.6 (1984) Political subunits

All political subunits within a covered jurisdiction (e.g., continues, cities, school districts) are subject to the requirement of Section 5.

28 C.F.R. §51.14(a) (1984) Enabling legislation and contingent or nonuniform requirements.

(a) The failure of the Attorney General to interpose an objection to legislation: (1) That enables or permits political subunits to institute a voting change or (2) that requires or enables political subunits to institute a voting change upon some future event or if they satisfy certain criteria does not exempt the political subunit itself from the requirement to obtain preclearance when it seeks or is required to institute the change in question, unless implementation by the subunit is explicitly included and described in the submission of such parent legislation.

28 C.F.R. §51.32 (1984) Expedited consideration.

(a) When a submitting authority is required under State law or local ordinance or otherwise finds it necessary to implement a change within the 60 day period following submission, it may request that the submission be given expedited consideration. The submission should explain why such consideration is needed and provide the date by which a determination is required.

(b) Jurisdictions should endeavor to plan for changes in advance so that expedited consideration will not be required and should not routinely request such consideration. When a submitting authority demonstrates good cause for expedited consideration the Attorney General will attempt to make a decision by the date requested. However, the Attorney General cannot guarantee that such consideration can be given.

(c) Notice of the request for expedited consideration will be given to interested parties registered under § 51.30.

28 C.F.R. §51.48 (1984). Absence of judicial review.

The decision of the Attorney General not to object to a submitted change or to withdraw an objection is not reviewable. However, Section 5 states: "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure."

Provisions of the Texas Election Code

Tex. Elec. Code Ann. art. 1.08c. (Vernon Supp. 1985) Limitation on early filing of application for place on ballot.

An application to have the name of a candidate, other than a candidate for the office of precinct chairman, placed on the ballot for any election may not be filed earlier than 30 days before the deadline prescribed by this code for filing the application. An application to have the name of a candidate for the office of precinct chairman placed on the ballot for election may not be filed earlier than 90 days before the deadline prescribed by the code for filing the application. An application filed before that day is void. The secretary of state shall not reimburse county chairmen for any expenses incurred by the early filing of candidates for the office of precinct chairman before the opening of filing for other offices.

Tex. Elec. Code Ann. art. 2.01b (Vernon Supp. 1985) Dates for holding general and special elections

(a) Except as provided in Subsections (b) and (e) of this section, every general (regular) or special election held by the state or by any county, city, school district, water district, or any other political subdivision or agency of this state must be held on one of the following dates: the third Saturday in January, the first Saturday in April, the second Saturday in August, or the first Tuesday after the first Monday in November. Provided, however, that in even-numbered years the only issues which may be submitted to the voters in an election held on the first Tuesday after the first Monday in November shall be the election of state and county officers, the election of officers of a general-law city or town wherein the governing body of said city finds that the religious tenets of more than 50 percent of the registered voters of said city prohibit the adherents from voting in an election held on Saturday, the election of officers of a home-rule city with a population of less than 30,000, according to the last preceding federal census, where such city or town used, prior to 1975, the first Tuesday after the first Monday in November of even-numbered years as the date for the election of its officers, and amendments to the constitution of this state submitted to the voters by the legislature.

This requirement does not apply to runoff elections, political subdivision using the convention method of election, local option elections held under the Alcholic Beverage Code, elections for bonds and elections for school maintenance taxes, to the biennial party primary elections held to nominate candidates for public office, or to confirmation elections, director elections, and maintenance tax elections, held in conjunction with the creation of political subdivisions provided for by Article XVI, Section 59, of the Texas Constitution, which furnish water or sewer services to household users. An election held on an unauthorized date is void.

(b) When a vacancy in office is to be filled at a special election, the election must be called for a date specified in Subsection (a) unless the governor finds the existence of an emergency that warrants calling the election for an earlier date. If the governor orders an emergency election, the election proclamation shall include a statement that identifies the nature of the emergency. An emergency election ordered by the governor may not be held on a day other than Tuesday or Saturday. When the governing body of a political subdivision wishes to call an emergency special election to fill a vacancy, the governing body shall submit a request to the governor for permission to call the election, and the governor may grant permission if he finds that an emergency exists.

(c) In even-numbered years the only issues which may be included on the ballot of the elction held on the first Tuesday after the first Monday in November shall be the election of state and county officers, the election officers, of a general-law city wherein the governing body of said city finds that the religious tenets of more than 50 percent of the registered voters of said city prohibit the adherents from voting in an election held on Saturday, the election of officers of a home-rule city with a population of less than 30,000, according to the last preceding federal census, where such city or town used, prior to 1975, the first Tuesday after the first Monday in November of even-numbered years as the date for the election of its officers, and constitutional amendments submitted to the people by the legislature. The governing body of local political subdivisions shall be allowed to choose for their permanent election day any of the above four election dates. The filing deadline for can-

didates, the dates for canvassing the returns of the election, the date for commencement of terms of office filled at the election, and any other date incidental to the election shall fall on the date that has the same relationship to the date of the election as provided under the preexisting law. Where by preexisting law the terms of office are set to commence on a specified calendar date and the date of the election is changed by this section, the governing board of the political subdivision shall set the date on which the terms begin until otherwise provided by law. A runoff election, when required, shall be held on a date that provides the same time interval with relation to the main election as provided under the preexisting law.

(d) When under the provisions of Subsection (c) the beginning date for a term of office is changed to fall on an earlier date, the current term on the effective date of this section is shortened accordingly, and the holder of the current term shall surrender the office to his successor on the beginning date of the succeeding term or as soon thereafter as the successor has qualified. When the beginning date is changed to fall on a later date, the incumbent in office at the expiration of the current term as set by preexisting law shall continue to perform the duties of the office, as required by Section 17 of Article XVI of the Texas Constitution, until the successor has qualified for the succeeding term.

(e) When a preexisting law requires that a special election be called within a specified time period after the occurrence of a certain event, the election shall be called for a date authorized in Subsection (a) of this section that falls within that time period; or if there is no authorized date within the period that allows sufficient time to comply with other requirements of law, the election shall be called for the first authorized date after its expiration, except that the election shall be called for some other date within the time period where the constitution requires it.

Tex. Elec. Code Ann. art. 4.01. (Vernon Supp. 1985) Proclamation by Governor

Notice shall be given to the people of all elections for State and district officers, electors for President and Vice-president

of the United States, members of Congress, and members of the Legislature. Such notices shall be by proclamation by the Governor ordering the election, not less than thirty-five (35) days before the election, issued and mailed to the several county judges.

Tex. Elec. Code Ann. art. 4.09. §§ 1,2,4,7 (Vernon 1967 & Supp. 1985) Special elections to fill vacancies in public offices.

Section 1. Where special elections are authorized by this Act, the officer authorized by law to order elections shall make such order, fixing the time of the election not less than twenty (20) nor more than ninety (90) days after the first public notice of such order.

Section 2. Election to fill unexpired term. Where vacancies which are to be filled by election occur in a civil office, an election shall immediately be ordered to fill the unexpired term.

* * *

Section 4. Election on resignation of incumbent of unexpired term. When the incumbent of an office, the vacancy of which is to be filled by election, tenders to the officer authorized by law to receive same a written resignation effective at a future date, an election shall be ordered immediately after acceptance of the resignation to elect a successor to the incumbent to fill the term of office unexpired from and after the effective date of the resignation.

* * *

Section 7. Governor may accept resignation. Where no officer is otherwise authorized by law to receive and accept the resignation of an officer, the Governor is hereby designated as the officer to do so and he is hereby empowered and authorized to receive and accept the resignation of all such officers.

Tex. Elec. Code Ann. art. 4.10 (Vernon Supp. 1985) Vacancy; application to get on ballot.

Subdivision 1. (a) Any person desiring his name to appear upon the official ballot at any special election held for the purpose of filling a vacancy, when no party primary has been held, may do so by presenting his application to the proper authority. Such application shall set forth:

(1) The name of the office sought;

(2) His occupation, his postoffice address, and the county of his residence;

(3) His age, place of birth, kind of citizenship, and length of residence in the county and state.

(b) In any special election for a statewide or district office which is regularly filled at the general election for state and county officers, the application shall also set forth the candidate's political party affiliation or shall state that the candidate is not affiliated with any political party.

Subdivision 2. Such application must be filed not later than 5 p.m. of the 31st day before any such special election, and shall not be considered filed unless it has actually been received by the officer with whom it is to be filed.

Subdivision 3. (a) The application must be filed with the Secretary of State in the case of a statewide or district special election. It must be accompanied with a fee of $1,000 for a statewide office, including without limitation the office of United States Senator, a fee of $500 for the district office of United States Representative, a fee of $400 for the district office of State Senator, and a fee of $200 for the district office of State Representative; or, in lieu of the filing fee, the application must be accompanied with a petition signed by at least 5,000 registered voters of the state in the case of a statewide office, and by at least 500 registered voters of the district in the case of a district office. A petition must show the address, voter registration number, and date of signing for each signer. No person may sign the petition of more than one candidate for the same office, and if a person signs the petition of more than one candidate, the signature is void as to all such petitions. A petition may be in multiple parts. To each part, which may consist of one or more sheets, there must be attached the affidavit of some registered voter, giving his address and voter registration number, and stating that each signature appearing in that part of the petition was affixed in the presence of the affiant and that to the best knowledge and belief of the

affiant each signature is genuine and each person signing was a registered voter at the time of signing. A petition so verified is prima facie evidence that the signatures thereon are genuine and that the persons signing it are registered voters. Fees received under this subdivision shall be deposited in the general revenue fund of the state.

(b) Upon receipt of an application which conforms to the above requirements, the Secretary of State shall issue his instruction to the county clerks of the state, or of the district in the case of a district vacancy, directing that the name of the applicant be printed on the official ballot.

(c) The party affiliation of the candidate shall be printed on the official ballot following the name of the candidate. If the candidate has stated in his application that he is not affiliated with any political party, the word "Independent" shall be printed on the ballot following the candidate's name. In other respects, the ballot shall be printed as indicated in Section 61 of this code (Article 6.05, Vernon's Texas Election Code) for a special election in which no party nomination has been made.

Subdivision 4. The application must be filed with the city secretary or clerk in the case of a municipal special election. A home-rule city by charter may require that the application be accompained with a reasonable filing fee or a petition of voters in lieu of the filing fee.

Tex. Elec. Code Ann. art. 4.11. (1)-(4) (Vernon Supp. 1985). Special elections for United States representative

Subdivision 1. In any special election called to fill a vacancy in the office of United States representative in any congressional district of the state, a majority vote of the electors participating in the election shall be necessary for election. In the event no candidate receives a majority of the votes cast at the first election, the Governor shall, within five days after the results of the election are officially declared, call a second election to be held on a specified day which shall be not less than thirty nor more than forty days after the date for the proclamation or order calling the election. In the second special election the candidates shall be limited to the participants in the first election who received the largest and next largest number of votes at the first election.

Subdivision 2. In any special election called to fill a vacancy in the office of United States representative, the commissioners court of each county in such district shall meet within three days after such election is held and canvass the returns thereof.

Subdivision 3. Whenever there shall be held a special election in any congressional district in this state for the election of United States Respresentative, the commissioners court of each county in such district shall meet within three days after such election is held and canvass the return thereof.

Subdivision 4. When a special election shall have been held for United States representative in any district, the county judge of each county in which such election was held shall, within twenty-four hours after the commissioners court opens the returns and canvasses the results, as provided in Subdivision 3 of this section, make out duplicate returns of the election, one of which he shall immediately transmit to the seat of government of the state, sealed in an envelope, directed to the Secretary of State, and endorsed "Election Returns for _____County, for United States Representative, District _____" (filling the first blank with the name of the county and the other blank with the number of the district for which the election was held); and the other of such returns shall be deposited in the office of the county clerk of the county where such election was held. Not later than the seventh day after the election, the day of the election excluded, the Secretary of State, in the presence of the governor and the citizen appointed under Section 120 of this code, shall open and canvass the returns of the election and declare the results thereof. If any person received a majority of the votes cast at the election, the Governor shall immediately make out, sign and deliver a certificate of election to such person for the unexpired term of the office for which he was a candidate. In the event no candidate received a majority of the votes cast at the election, the Governor shall call a second election as provided in Subdivision 1 of this section and the Secretary of State shall within five days after the results of the first election are officially declared, certify to the county clerk of each county in the district the names of the two candidates who are eligible to participate in the second election and the clerks shall make up the ballot for election according to the certificate. The results of the second election shall be canvassed and the results declared in the same manner as herein provided for the first election, and the Gover-

nor shall issue to the candidate who receives the largest number of votes in the second election a certificate of election to the unexpired term of the office for which he was a candidate.

* * *

APPENDIX D

Turner v. Fainter, No. A-83-CA-35 (W.D. Tex. Feb. 8, 1983)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

REV. LEE TURNER, Et Al.,
Plaintiffs,

versus

JOHN FAINTER,
Defendant.
CIVIL ACTION NO. A83CA35

PHIL GRAMM and
CHESTER R. UPHAM, JR.,
Intervenors.

Before WILLIAMS, Circuit Judge, SHANNOR and GARCIA, District judges.

PER CURIAM:

This is a suit to enjoin the holding of the special election scheduled for Saturday, February 12, 1983, in the Sixth Congressional District to fill the vacancy created by the resignation of Representative Phil Gramm on January 5, 1983. The Governor set the special election to take place thirty-eight days after the resignation, finding an emergency under the Texas Election Code. The plaintiffs, voters in the Sixth District, seek a preliminary injunction against the election being held absent a preclearance obtained by the State from the Attorney General of the United States.

Reverand Lee Turner and other plaintiffs filed suit in the United States District Court for the Eastern District of Texas, asserting that the scheduling of the election violated the constitutional rights of minorities under the Fifth, Fourteenth, and Fifteenth Amendments, and was in violation of the Voting Rights Act, 42 U.S.C. § 1973(c), because of a lack of preclearance.

After jurisdiction was denied in the Eastern District of Texas, suit was then brought in the Western District. Judge H.F. Garcia ordered hearing before a three-judge federal court, 28 U.S.C. § 2284 (b)(1).

The parties agreed at oral argument that there are no fact issues before the Court. It is agreed that the Governor was in full compliance with the terms of the Texas Election Code in calling this special election. Eleven candidates have been certified by the Secretary of State to appear on the ballot for this special election.

The Court finds the facts in accordance with these agreed facts.

The calling of this special election by the Governor is in accordance with the past practice of the State of Texas both before and after 1972 or the passage of the 1975, 1977 Election Codes in Texas. It is not for this Court to decide whether the Governor in this case properly decided that such a special election was "an emergency". The statute specifically vests this power in the Governor without limitations upon him in deciding the justification for the declaration of such an emergency. The evidence is also clear that such declarations have been routine matter in special elections to fill congressional vacancies in Texas.

Based upon the facts in this case we are unable to find a "change" in the procedures. Section 1973(c) of the Voting Rights Act requires such a change before preclearance is necessary. The changes that took place with respect to this election took place entirely in the 1975 and 1977 Amendments to the Texas Election Code, and the Attorney General of the United States has given blanket clearance to the provisions of this Code as it relates to the election which is before the Court. We find, for purposes of a preliminary injunction, no necessity for clearance.

Plaintiffs also claim that setting this special election violated their constitutional rights under the Fifth, Fourteenth and Fifteenth Amendments. Their claim is not specific. No actual situations are before the Court. Rather, there is only a general

assertion that the short period of five days which was available to potential candidates to obtain signatures in lieu of a $500 filing fee and available for potential candidates to decide whether or not to run discriminated against minorities. This period of elapsed time is not, however, a change in election procedures.

This election has now been scheduled for over a month. The Texas Election Code authorizes setting such an election thirty-five days or more after the proclamation, and this provision was followed. We find that plaintiffs have made no showing which justifies the drastic remedy of enjoining the holding of this special election. Denial of the injunction does not foreclose plaintiffs raising issues involving the legality of this election. If there are issues as to the legality of the election, they can be litigated after the election is held. *Cf. Berry v. Doles*, 438 U.S. 190 (1978).

In view of our legal conclusions, this three-judge federal district court exercising its jurisdiction under 42 U.S.C. § 2284(b)(1), holds as follows:

Plaintiffs' prayer for an injunction enjoining the holding of the special election on February 12, 1983, is DENIED.

APPENDIX E

Texas's Brief in Opposition to Motion for Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff	§	
	§	
V.	§	**CIVIL ACTION NO. SA-85-CA-2199**
	§	
	§	
STATE OF TEXAS; MARK WHITE, GOVERNOR OF THE STATE OF TEXAS; MYRA A. McDANIEL, SECRETARY OF STATE OF THE STATE OF TEXAS,	§	
	§	
Defendants.	§	

DEFENDANTS' BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

TO THE HONORABLE COURT:

I. Introduction

The federal government seeks a preliminary, mandatory injunction to force the State of Texas to submit within five days three alleged "voting changes" for review under Section 5 of the Voting Rights Act.[1] The government seeks this injunction before a trial on the merits but after all alleged voting changes have taken place. Such relief is improper and unprecedented.[2]

---

1. The government curiously does not seek to enjoin the run-off election scheduled for August 3, 1985.

2. The government does not cite a single case in which a preliminary injunction ordering a state to seek preclearance has been granted.

Properly granted a preliminary injunction is designed to protect the court's jurisdiction by preserving the status quo. *Middleton-Keirn v. Stone*, 655 F.2d 609 (5th Cir. 1981). A preliminary injunction here would have the contrary result. By attempting to force Texas to submit its special election for preclearance prior to trial on the merits, the government seeks to obtain what would constitute final resolution of the controversy through preliminary procedures. Thus, a preliminary injunction would render this case moot, thereby depriving the court of jurisdiction instead of preserving it.

In addition to preserving the status quo, a preliminary injunction may be granted upon consideration of four factors:

(1) a substantial likelihood of success on the merits;

(2) a substantial threat of irreparable injury if the injunction is not issued;

(3) that the threatened injury to the movant outweighs any damage the injunction might cause to the opponent; and

(4) that the injunction will not disserve the public interest.

Enterprise International, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 471 and n. 24 (5th Cir. 1985). The government has not met its burden on any of the four factors.

II. The Government Is Not Likely to Succeed On The Merits.

A. Texas Has Implemented No "Change" Within the Meaning of Section 5.

The government alleges that Texas has implemented three "changes" within the meaning of Section 5 of the Voting Rights Act. These alleged "changes" as described by the government consist of the following:

(1) the establishment of a shortened candidate qualification period ending on May 29, 1985;

(2) the selection of June 29, 1985 for the first special election; and

(3) the selection of August 3, 1985 for the second (runoff) special election.

The method of selecting the above dates reflects well-established Texas election practice which pre-dates the Voting Rights Act. Therefore, preclearance of the above procedures is inappropriate under the terms of Section 5.

The federal Constitution requires that the "executive authority" in each state call a special election to fill such a vacancy. U.S.C.A., Const. Art. I, §2, cl. 4. Federal law provides that the time and manner for holding the election be prescribed by State law. 2 U.S.C.A., §8. Texas law authorizes the Governor to call special elections pursuant to the following provisions:

1. Art. 4.01 of the Texas Elec. Code which requires notice be issued by proclamation of the governor on or before the 36th day before the election;

2. Art. 4.09 of the Texas Elec. Code which provides that special elections to fill vacancies be called for date not less than 20 nor more than 90 days after the first notice of the election order;

3. Art. 4.10 of the Texas Elec. Code which establishes that a candidate must file not later than thirty days before a special election;

4. Art. 4.11 of the Texas Elec. Code which governs special elections to fill vacancies in the office of United States Representative; and

5. Art. 2.01(b) of the Texas Elec. Code which requires that a special election be called on one of four uniform dates specified in subsection (a) of that article, unless the governor declares an emergency and calls the election for a date pursuant to his general powers under art. 4.01 *et seq.*

Arts. 4.01 and 4.09 were included in the Election Code when it was originally enacted by the 52nd Legislature in 1951. Both arts. 4.01 and 4.09 were amended in 1981 to delete obsolete language. The Civil Rights Division of the U.S. Department of Justice notified the Secretary of State of Texas that the Attorney General interposed no objection to these changes on August 8, 1981 and September 8, 1981, respectively.

Art. 2.01b was enacted in 1975 and again in 1977. It received Justice Department preclearance on December 15, 1975 and again on August 22, 1977. Article 2.01b has two main effects. These are: 1) to require political subdivisions to hold their general elections on uniform dates statewide; and 2) to limit special elections to uniform dates, absent the finding of an emergency by the governor. In this latter respect, art. 2.01b serves to narrow, rather than to expand, the pre-existing authority of the Governor in setting the dates for special election. In 1983 art. 2.01b was amended to narrow further the Governor's authority in this respect by limiting election dates in emergency situations to Tuesdays and Saturdays. The 1983 amendment was seen as an additional step in accomplishing the goals of art. 2.01b as stated above. The 1983 amendment was strongly endorsed by minority groups throughout Texas, and was precleared by the Justice Department on July 12, 1983.

The date for a runoff election is governed by art. 4.11 of the Texas Election Code. Art. 4.11 of the Texas Election Code. Art. 4.11 was enacted in 1961 and subsequently amended in 1967 and is not subject to preclearance.

Since the procedures for calling special elections to fill vacancies and setting the date for those elections were in existence before November 1, 1972, or were precleared, there is no requirement to make a submission to the U.S. Attorney General concerning these procedures.

Apparently, the government contends that it reversed certain "changes" from preclearance in its letters of 1975 and 1977 concerning H.B. 275 (1975) and H.B. 443 (1977). Actually, the letters unequivocally preclear each version of Art. 2.01b without reservation but expresses the Attorney General's opinion concerning the submissibility of changes in election dates made

by political subdivisions. Assuming, however, that the language in the letter constitutes a reservation of the Attorney General's approval, by its very language any government reservation related only to dhanges in the annual or biannual general election date selected by local political subdivisions pursuant to Art. 2.01b(c) which authorizes such changes. Clearly such changes are subject to preclearance. The Attorney General did not challenge the well established procedures used by the Governor to fill vacancies in public office.

B. This Case is Controlled By Turner v. Fainter

In *Turner v. Fainter*, Civ. No. A83CA35 (W.D. Tex., Feb. 8, 1983), a three-judge court was asked to consider a voting rights challenge identical to the instant case. The election considered in *Turner* was an election to fill a vacancy in the Office of U.S. Representative, District 6. This vacancy was created by the resignation of then Congressman Phil Gramm on January 5, 1983. The election in *Turner* was called 38 days before the date set for the election. In both *Turner* and the instant case the Governor declared an emergency under the authority granted him by articles 2.01b and 4.09 of the Election Code, and ordered the election to be held earlier than the next uniform election date.

The court found that the calling of the special election was in accordance with past practice of the State of Texas, both before and after the State came under the preclearance provisions of the Voting Rights Act. The court stated that the statute specifically vested in the Governor the power to declare an emergency, without limitation, and that the evidence was clear that such declarations had been routine in calling special elections to fill congressional vacancies.

Not only was the court unable to find that the calling of the election constituted a "change" that required preclearance, but stated that in its opinion the Justice Department had given blanket clearance to the provisions of article 2.01b that permit the Governor to determine that an emergency exists.

The government relies on two cases to argue that the holding in *Turner* should be overturned: *NAACP v. Hampton County Election Commission*, _____U.S._____, 53 U.S.L.W. 4207 (U.S., Feb. 27, 1985) and *Garcia v. Guerra*, 744 F.2d 1159 (5th Cir. 1984), *cert. denied* No. 84-1367 (April 29, 1985). In *NAACP v. Hampton*, the Supreme Court addressed *new* legislation combined with unprecedented procedures which were subject to preclearance. the issue in *Hampton* was whether changes in the election date and filing deadline which were not authorized by any statutory procedures or established practices were subject to preclearance and the Court found that they were.

In *Garcia*,[3] the Court held that even though all four uniform election dates had been precleared under Section 5 of the Voting Rights Act, a school district must make a submission to utilize one of the uniform dates different from that which has traditionally been used. The Court found at page 1165 "... the established fact in this case is that abandoning the usual April date for school elections for the August date was a "change" which had the effect of depriving substantial numbers of Hispanic voters of the right to vote in the election."

Hampton and *Garcia* are consistent with the court's reasoning in *Turner*. When a date is chosen outside of any past practice or statutorily authorized procedure, the change is submissible. *NAACP v. Hampton County, supra.* When a date different from the traditional time is chosen for a regular school district election, the change is submissible. *Garcia v. Guerra, supra.* If there is a change in the traditional and statutory processes flowing from a vacancy in office, the change is submissible. *Turner v. Fainter, supra.* The *Turner* Court could find no changes when the Governor continued to choose dates within the established constraints and procedures of Texas law. In the case at bar, the Governor's actions are typical of past practice as may be proven upon a trial on the merits. His actions are not submissible under Section 5 of the Voting Rights Act. Therefore, it is not probable that the government will prevail on the merits.

---

3. The Court addressed what it believed to be a regular, reoccurring election traditionally held in April, when, in fact, the election was a one-time special election. The State of Texas was not a party.

II. The Government Can Show No Irreparable Harm If The Preliminary Injunction Is Not Granted.

The government blatantly fails to assert that any injury will be suffered by it or any others if relief is not granted. (Memorandum in Support, pp. 17-18). Instead, the government argues that irreparable injury is presumed as a matter of law where there is a clear violation of a statutory mandate and where injunctive relief is statutorily authorized. The government relies on *United States v. Hayes International Corp.*, 415 F.2d 1038 (5th Cir. 1969), and other civil rights cases involving "a pattern and practice of employment discrimination on account of race." *Id.* at p. 1045.

The government has cited no Voting Rights Act cases which dispose of the requirement of establishing irreparable harm. The civil rights cases are not applicable because of the distinction in the character of conduct addressed by each Act. Under the Civil Rights Act of 1964, specific conduct which is deemed to be harmful to a protected class if prohibited; each of the cases cited by the government involved allegations of actual injury necessitating preliminary relief. The structure of Section 5 of the Voting Rights Act, however, is prophylactic. The prohibited counduct is not the ultimate evil to be prevented. That is, the administration of changes in election practices or procedures prior to preclearance does not necessarily work any evil to a protected class. In fact, the complaint filed by the government in this case does not allege actual harm to any class of persons protected under the Voting Rights Act.

The Supreme Court holding in *NAACP v. Hampton County, supra*, is further support that the failure to submit, alone, can never form the basis for preliminary injunction. The Court determined that the validity of an election need not necessarily be disturbed by the Courts if the Attorney General determines *after* an election that changes had no discriminatory purpose or effect. If, on the other hand, under a post election submission it is determined by the Attorney General that the state has failed to meet its burden under Section 5 proceedings to establish the absence of discriminatory purpose or effect, and interposes his objection to the proposed change, the results of the election can be set aside. *Id* at p. 1138. (The government

has effectively conceded this point by seeking a submission after the June 29, 1985 election.) Therefore, the government suffers no irreparable harm by awaiting final determination of the merits by this Court.

III. Potential Harm to Texas is Grave and Relief Sought by the Government is Not Necessary to Serve Purposes of Voting Rights Act

The government's assertion that the relief sought would require Texas "only to draft a simple letter describing the changes and send it to the Attorney General" is disingunous. On the contrary, such submission would provide the Attorney General with at least 60 days in which to review the subject matter of the submission. The submitted procedures could not be enacted until notification was received from the Attorney General that no objection was being interposed. 42 U.S.C.A. 1973c. While the plaintiff has asserted that any submission could be expeditiously reviewed, such an assertion is purely gratuitous. The Attorney General is bound by no law or rule to make any determiniation any sooner than 60 days after receipt of the submission.

If Texas submits the holding of this election for preclearance, that submission will serve as precedent under which the Justice Department will require submission of every election date the Governor sets pursuant to the Governor's extant authority under state and federal law. The scope of such relief would effect a major administrative burden on Texas and upon all other jurisdictions covered by Section 5. The legal principle at stake extends to much more than an election ordered by the Governor to fill a congressional vacancy. This issue has direct implications for all other special elections called by covered jurisdictions, including all proposition elections.

Vacancies in the offices of congressman, state senator or state representative are not uncommon. Between 1966 and November 1972, when Texas came under the Voting Rights Act, 2 congressional vacancies and 18 legislative vacancies were filled using this procedure. Since Texas came under the Act, 4 congressional vacancies and 42 legislative vacancies have been filled using this procedure. Preclearing the dates of the

elections to fill these vacancies would leave the offices vacant for three to six months. Other political subdivisions would be affected as well. A city council, without a quorum because of resignations or deaths or removal of officers, that asks the Governor to order an emergency special election so it can conduct business, will be unable to conduct business until the election date is precleared, which could mean a delay of, again, three to six months. Effectively, the requirement of preclearance will abrogate the Governor's authority to call an emergency special election under article 2.01(b), and certainly the requirement will seriously hamper the ability of the State and other political subdivisions to conduct business, by prolonging the period without representation.

The sought relief would additionally effect a major hardship upon the voters of the 1st Congressional district of Texas. The voters of the 1st congressional District have a right to representation in the U.S. Congress. The State of Texas has undertaken the proper legal and administrative steps to restore such representation to the voters of the 1st Congressional District. The sought relief would preclude the conduct of the procedures necessary for the restoration of congressional representation to the 1st Congressional District for the time necessary for the Attorney General's review, a period which may take as long as 120 days (if additional information is requested), not including the time required for preparation and transmission of the submission.

IV. Public Interest Requires No Interruption in Election Process Currently Underway

The government alleges that the public interest requires the granting of preliminary relief. On the contrary, the public interest requires that the elction procedures already in progress continue without interruption. The government's attempt at this time to cast a cloud over the election procedures which have been underway since May 24, 1985, can only have the effect of undermining public confidence in the election procedures, confusing voters as to the scheduling of the elections, and reducing voter turnout. The government's obvious interest in seeking only the most formal of submissions (see, Memorandum in Support, p. 19) precludes any argument that relief is necessary to accomplish the goals of the Voting Rights Act.

Conclusion

For the foregoing reasons, the State of Texas respectfully requests the Motion for Preliminary Injunction be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant Attorney
General for Litigation

MARY F. KELLER
Special Assistant Attorney
General

P.O. Box 12548, Captiol Station
Austin, Texas 78711
(512) 475-1761

On the Brief:

Robert L. Lemens
Assistant Attorney General

Karen Gladney
Special Assistant
Elections Division
Secretary of State

John Steiner, Attorney
Elections Division
Secretary of State

CERTIFICATE OF SERVICE

I hereby certify that the Defendant's Brief in Opposition to Motion for Preliminary Injunction was hand-delivered to Mr. Steven Rosenbaum, Attorney, Voting Section, Civil Rights Division on August 1, 1985.

MARY F. KELLER

APPENDIX F

Selected Exhibits from the Record of the August 1, 1985, Hearing before the District Court.

(In some instances not all the documents constituting an exhibit are shown.)

JSP:JM:peb
DJ 166-012-3
XO548

[date illegible]

Mr. John F. Pettit
General Counsel
Office of the Secretary of State
State of Texas
Austin, Texas 78711

Dear Mr. Pettit:

This is in reference to House Bill 275, consolidating election days in the State of Texas, which was submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965. Your submission was received on November 20, 1975. In accordance with your request, expedited consideration has been given to this submission pursuant to the procedural guidelines for the administration of Section 5 (28 C.F.R. 51.22).

The Attorney General does not interpose an objection to the change in question. Moreover, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that our failure to object does not bar any subsequent action to enjoin the enforcement of this act should such action become necessary.

In reference to your request that your submission be considered a blanket submission for all political subdivisions in Texas, the submission is considered a blanket submission for those changes which are mandated by H.B. 275. Where H.B. 275 merely authorizes political subdivisions to make changes, *i.e.*, Section 1c (where the governing body of political subdivisions whose elections fall in October or November may choose any of the four (4) dates) and Section 2, the changes would fall under Section 5 of the Voting Rights Act separately as the changes occur.

Sincerely,

J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

Government Exhibit 4

DSU:DRM:EF:peb
DJ 166-012-3
A1477

Aug. 22[,] 1977

Honorable Mark White
Secretary of State
State of Texas
Capitol Station
Austin, Texas 78711

Attention: Ms. Karen C. Gladney
Election Division

Dear Mr. Secretary:

This is in reference to House Bill 443 of the 1977 Texas Legislature, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on June 30, 1977. Although we noted your request for expedited consideration, we were unable to comply.

The Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change.

We wish to remind you that any changes in election date made pursuant to House Bill 443 (1977) are subject to the preclearance requirements of Section 5.

Sincerely,

Drew S. Days III
Assistant Attorney General
Civil Rights Division

By:
GERALD W. JONES
Chief, Voting Section

Government Exhibit 5

WBR:SSC:QJ:gml
DJ 166-012-3
H1717

July 22, 1983

Honorable John W. Fainter, Jr.
Secretary of State of Texas
Elections Division
Post Office Box 12887
Austin, Texas 78711

Dear Mr. Secretary:

This is in reference to House Bill No. 166 (1983), which limits to Tuesdays and Saturdays the days on which an emergency special election may be called by the Governor under V.A.T.S. Election Code, art. 2.01b(b) and requires the Governor to include in his proclamation a statement that identifies the nature of the emergency in the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 973c. We received your submission on May 13, 1983.

The Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.48).

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By:
GERALD W. JONES
Chief, Voting Section

Government Exhibit 6

THE STATE OF TEXAS

SECRETARY OF STATE

I, DUANE E. CROWLEY, ASSISTANT SECRETARY OF STATE OF THE STATE OF TEXAS, DO HEREBY CERTIFY that the attached is a true and correct summary of special elections conducted to fill congressional and legislative vacancies in Texas from January 1966 through the present.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this 31st day of July, 1985.

DUANE E. CROWLEY
ASSISTANT SECRETARY OF STATE

Defendant's Exhibit D

SPECIAL ELECTION PROCLAMATIONS

Governor	Proclamation No.	Date of Pro.	Date of Election	Type	Filing Deadline	Time Between Proclamation and Dealine	Day
Connally	41-1105	2-19-66	3-26-66	U.S. Cong. Dist. 8	2-23-66	4 da.	Sat.
Connally	41-1136	11-30-66	1-7-67	St. Rep. Dist. 35 Pl. 2	12-7-66	7 da.	Sat.
Connally	41-1148	4-18-67	5-25-67	St. Rep. Dist. 20F	4-24-67	6 da.	Thur.
Connally	41-1199	7-19-67	11-11-67	St. Rep. Dist. 22 Pl. 7	10-12-67	3 mo.	Sat.
Connally	41-1200	8-7-67	11-11-67	St. Rep. Dist. 24 Pl. 2	10-11-67	2 mo.	Sat.
Connally	41-1204	8-17-67	11-11-67	St. Rep. Dist. 47 Pl. 2	10-11-67	2 mo.	Sat.

Governor	Proclamation No.	Date of Pro.	Date of Election	Type	Filing Deadline	Time Between Proclamation and Dealine	Day
Connally	41-1206	8-25-67	11-11-67	St. Rep. Dist. 30	10-11-67	2 mo.	Sat.
Connally	41-1207	8-29-67	11-11-67	St. Sen. Dist. 8	10-11-67	2 mo.	Sat.
Connally	41-1208	8-30-67	11-11-67	St. Rep. Dist. 75	10-11-67	1 mo. 10 da.	Sat.
Connally	41-1213	10-2-67	11-11-67	St. Rep. Dist. 39 Pl. 2	10-11-67	9 da.	Sat.
Connally	41-1244	3-29-68	5-14-68	St. Rep. Dist. 23 Pl. 1	4-13-68	15 da.	Tue.
Connally	41-1245	3-29-68	5-14-68	St. Rep. Dist. 48F	4-13-68	15 da.	Tue.

Governor	Proclamation No.	Date of Pro.	Date of Election	Type	Filing Deadline	Time Between Proclamation and Dealine	Day
Connally	41-1246	3-29-68	5-14-68	St. Rep. Dist. 33 Pl. 4	4-13-68	15 da.	Tue.
Connally	41-1254	5-13-68	6-18-68	St. Rep. Dist. 33 Pl. 5	5-18-68	5 da.	Tue.
Connally	41-1257	7-19-68	8-24-68	U.S. Cong. Dist. 3	7-24-68	5 da.	Sat.
Connally	41-1273	1-18-69	2-11-69	St. Rep. Dist. 49			Sat.
Smith	41-1342	6-30-69	7-22-69	St. Rep. Dist. 73			Tue.
Smith	41-1453	3-22-72	6-13-72	St. Rep. Dist. 9 Pl. 4	5-13-72	2 mo.	Tue.

Governor	Proclamation No.	Date of Pro.	Date of Election	Type	Filing Deadline	Time Between Proclamation and Dealine	Day
Smith	41-1457	4-28-72	6-6-72	St. Sen. Dist. 24	5-6-72	8 da.	Tue.
Smith	41-1461	8-3-72	9-16-72	St. Rep. Dist. 46 Pl. 3	8-16-72	13 da.	Sat.
Briscoe	41-1476	6-7-73	7-17-73	St. Sen. Dist. 14	6-16-73	9 da.	Tue.
Briscoe	41-1477	6-12-73	7-17-73	St. Rep. Dist. 37 Pl. 3	6-16-73	4 da.	Tue.
Briscoe	41-1517	3-15-74	4-20-74	St. Rep. Dist. 84	3-20-74	5 da.	Sat.
Briscoe	41-1525	12-20-74	1-11-75	St. Sen. Dist. 6	12-24-74	4 da.	Sat.

Governor	Proclamation No.	Date of Pro.	Date of Election	Type	Filing Deadline	Time Between Proclamation and Dealine	Day
Briscoe	41-1526	12-20-74	1-11-75	St. Rep. Dist. 96	12-24-74	4 da.	Sat.
Briscoe	41-1566	1-23-76	2-28-76	U.S. Cong. Dist. 22	1-28-76	5 da.	Sat.
Briscoe	41-1567	1-23-76	2-28-76	St. Sen. Dist. 7	1-28-76	5 da.	Sat.
Briscoe	41-1568	1-23-76	2-28-76	St. Rep. Dist. 97	1-28-76	5 da.	Sat.
Briscoe	41-1569	1-23-76	2-28-76	St. Rep. Dist. 80	1-28-76	5 da.	Sat.
Briscoe	41-1577	3-25-76	6-19-76	U.S. Cong. Dist. 1	5-19-76	2 mo.	Sat.

Governor	Proclamation No.	Date of Pro.	Date of Election	Type	Filing Deadline	Time Between Proclamation and Dealine	Day
Briscoe	41-1586	7-2-76	8-7-76	St. Rep. Dist. 57E	7-7-76	5 da.	Sat.
Briscoe	41-1589	7-9-76	8-14-76	St. Rep. Dist. 90	7-14-76	5 da.	Sat.
Briscoe	41-1604	6-9-77	7-16-77	St. Rep. Dist. 33D	6-15-77	6 da.	Sat.
Briscoe	41-1643	9-14-77	11-8-77	St. Rep. Dist. 37B	10-8-77	26 da.	Tue.
Briscoe	41-1645	9-14-77	11-8-77	St. Sen. Dist. 31	10-8-77	26 da.	Tue.
Briscoe	41-1646	9-14-77	11-8-77	St. Rep. Dist. 71	10-8-77	26 da.	Tue.

Governor	Proclamation No.	Date of Pro.	Date of Election	Type	Filing Deadline	Time Between Proclamation and Dealine	Day
Briscoe	41-1648	10-3-77	11-8-77	St. Rep. Dist. 33-0	10-8-77	5 da.	Tue.
Briscoe	41-1658	12-15-77	2-18-78	St. Sen. Dist. 3	1-18-78	34 da.	Sat.
Briscoe	41-1659	12-15-77	2-18-78	St. Rep. Dist. 4	1-18-78	34 da.	Sat.
Briscoe	41-1661	1-3-78	2-18-78	St. Rep. Dist. 5	1-18-78	15 da.	Sat.
Briscoe	41-1662	1-5-78	2-18-78	St. Rep. Dist. 25	1-18-78	13 da.	Sat.
Briscoe	41-1699	12-15-78	1-6-79	St. Rep. Dist. 56	12-20-78	5 da.	Sat.

Governor	Proclamation No.	Date of Pro.	Date of Election	Type	Filing Deadline	Time Between Proclamation and Dealine	Day
Clements	41-1708	5-25-79	6-30-79	St. Rep. Dist. 56	12-20-78	5 da.	Sat.
Clements	41-1768	12-14-79	1-19-80	St. Rep. Dist. 87	12-19-79	5 da.	Sat.
Clements	41-1770	1-3-80	2-7-80	St. Rep. Dist. 80	1-7-80	4 da.	Thur.
Clements	41-1782	10-17-80	11-22-80	St. Rep. Dist. 63	10-22-80	5 da.	Thur.
Clements	41-1786	12-15-80	1-10-81	St. Rep. Dist. 83	12-19-80	4 da.	Sat.
Clements	41-1788	1-9-81	2-10-81	St. Sen. Dist. 27	1-14-81	5 da.	Tue.

Governor	Proclamation No.	Date of Pro.	Date of Election	Type	Filing Deadline	Time Between Proclamation and Dealine	Day
Clements	41-1790	1-16-81	2-10-81	St. Rep. Dist. 57-C	1-21-81	5 da.	Tue.
Clements	41-1792	3-4-81	3-31-81	St. Rep. Dist. 50	3-9-81	5 da.	Tue.
Clements	41-1844	10-29-81	12-5-81	St. Rep. Dist. 57F	11-4-81	6 da.	Sat.
Clements	41-1853	4-28-82	5-22-82	St. Rep. Dist. 7	5-3-82	5 da.	Sat.
Clements	41-1870	10-1-82	11-6-82	St. Sen. Dist. 18 unexpired term	10-6-82	5 da.	Sat.
Clements	41-1874	11-23-82	12-15-82	St. Sen. Dist. 18 full term	11-28-82	5 da.	Wed.

Governor	Proclamation No.	Date of Pro.	Date of Election	Type	Filing Deadline	Time Between Proclamation and Dealine	Day
Clements	41-1875	11-23-82	12-15-82	St. Rep. Dist. 32	11-28-82	5 da.	Wed.
Clements	41-1877	1-5-83	2-12-83	U.S. Cong. Dist. 6	1-12-83	7 da.	Sat.
White	41-1937	10-11-83	11-19-83	St. Rep. Dist. 115	10-19-83	8 da.	Sat.
White	41-1941	1-20-84	4-7-84	St. Rep. Dist. 49	3-7-84	1 mo. 18 da.	Sat.
White	41-1942	1-24-84	4-7-84	St. Rep. Dist. 91	3-7-84	1 mo. 14 da.	Sat.
White	41-1943	1-24-84	3-10-84	St. Rep. Dist. 14	2-8-84	15 da.	Sat.

Governor	Proclamation No.	Date of Pro.	Date of Election	Type	Filing Deadline	Time Between Proclamation and Dealine	Day
White	41-1948	2-17-84	3-24-84	St. Rep. Dist. 73	2-22-84	5 da.	Sat.
White	41-1949	2-17-84	3-24-84	St. Rep. Dist. 15	2-22-84	5 da.	Sat.
White	41-1951	3-22-84	4-28-84	St. Rep. Dist. 33	3-28-84	6 da.	Sat.
White	41-1982	3-27-85	4-27-85	St. Sen. Dist. 6	4-1-85	5 da.	Sat.
White	41-1985	5-24-85	6-29-85	U.S. Cong. Dist. 1	5-29-85	5 da.	Sat.
White	41-1990	6-10-85	8-10-85	St. Rep. Dist. 140	7-10-85	1 mo.	Sat.

Supreme Court, U.S.
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CLERK

No. 85-714 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1985

TEXAS, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO AFFIRM

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

WALTER W. BARNETT
MARIE KLIMESZ MCELDERRY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a special election schedule established by the Governor of Texas pursuant to his discretionary authority under state law effects a change in a "standard, practice, or procedure with respect to voting" that is subject to preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-714

TEXAS, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the Solicitor General, on behalf of the United States, moves that the judgment of the district court in this case be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. A1-A4) is unreported.

JURISDICTION

The judgment of the district court was entered on August 1, 1985. A notice of appeal (J.S. App. B1) was filed on September 27, 1985, and the appeal was docketed on October 26, 1985. The jurisdiction of this Court is invoked under 42 U.S.C. 1973c.

STATEMENT

1. On May 24, 1985, Representative Sam B. Hall resigned his position as congressman from the Texas First Congressional District (J.S. App. A1). The Texas Election Code provides that a vacancy in the office of United States representative must be filled through a special election (Tex. Elec. Code Ann. arts. 4.09(4), 4.11 (Vernon Supp. 1985)).[1] The statute further states that "[w]hen a vacancy in office is to be filled at a special election, the election must be called for a date [specified in the statute] unless the governor finds the existence of an emergency that warrants calling the election for an earlier date" (*id.* art. 2.01b(b)). In this case, the date specified by the statute would have been "the second Saturday in August," August 10, 1985—78 days after Representative Hall's resignation.[2] Since the statute provides that applications by candidates for a place on the ballot may be filed for a period of 30 days terminating on the thirty-first day before the special election,

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[1] Texas recodified its election laws in 1985 (see Tex. Elec. Code Ann. (Vernon Supp. 1986)), retaining the provisions at issue in this case. See, *e.g.*, Tex. Elec. Code Ann. §§ 41.001, 201.052-201.053 (Vernon Supp. 1986) (date of election); *id.* § 201.055 (candidate filing period); *id.* § 204.021 (vacancy in office of United States representative). The recodification was precleared by the Attorney General on August 16, 1985. We will refer to the provisions in effect at the time of the events in this case.

[2] The statute establishes four uniform election dates (Tex. Elec. Code Ann. art. 2.01b(a) (Vernon Supp. 1985)), and states that a special election shall be called for the first uniform date that occurs within 20 to 90 days of the first public notice of the order calling the election (Tex. Elec. Code Ann. art. 4.09(1) (Vernon Supp. 1985)).

the candidate qualifying period here would have run from June 10 to July 10 (*id.* arts. 1.08c, 4.10(2)).

However, on May 24, 1985—the day that Representative Hall resigned—Governor White exercised his statutory discretion to declare the "existence of an emergency that warrants calling the election for an earlier date," and issued an order calling the election for Saturday, June 29, 1985, only 36 days after Representative Hall's resignation. The Governor's order provided that the candidate qualifying period would end on May 29, 1985, five days after the issuance of the proclamation declaring the vacancy and establishing the election schedule. J.S. App. A1.

The United States notified Governor White in writing on June 27, 1985, that his order establishing the "emergency" special election schedule constituted a change affecting voting within the meaning of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, and that, accordingly, the election schedule was subject to the statute's preclearance requirement.[3] In view of the short amount of time left until the election, the United States offered to process the State's submission as quickly as possible. J.S. App. A2. Relying on *Turner* v. *Fainter*, No. A83CA35 (W.D. Tex. Feb. 8, 1983) (J.S. App. D1-D3), Texas took the position that the order setting the schedule for

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[3] Section 5 provides that a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" in a State in which the statute applies cannot take effect until the change is precleared by the District Court for the District of Columbia or the Attorney General of the United States, who must evaluate the proposed change to determine whether it has the purpose, or will have the effect, of discriminating on account of race, color, or membership in a language minority group.

the special election was not a change covered by Section 5 and declined to submit the election schedule to the Attorney General for preclearance (J.S. App. A2).

The special election was held as scheduled on June 29, 1985. Since none of the candidates received a majority of the votes cast, a runoff election was required under Texas law. Governor White called the runoff election for August 3, 1985, the earliest date permitted by statute (J.S. App. A1-A2).[4]

2. On July 22, 1985, the United States commenced this action in the United States District Court for the Western District of Texas seeking a temporary restraining order and preliminary injunction requiring appellants to submit the "emergency" election plan for preclearance under Section 5 (J.S. App. A1). The United States contended that the imposition of the shortened candidate qualification period, the selection of June 29, 1985, as the first election date, and the selection of August 3, 1985, as the runoff election date were voting changes covered by Section 5.

The three-judge court concluded that appellants were required to obtain preclearance of the election plan (J.S. App. A1-A4). Relying on this Court's decision in *NAACP* v. *Hampton County Election Commission*, No. 83-1015 (Feb. 27, 1985), the three-judge

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[4] The statute provides that "[i]n the event no candidate receives a majority of the votes cast at the [special election to fill a vacancy in the office of United States representative], the Governor shall, within five days after the results of the election are officially declared, call a second election to be held on a specified day which shall be not less than thirty nor more than forty days after the date of the proclamation or order calling the election" (Tex. Elec. Code Ann. art. 4.11(1) (Vernon Supp. 1985)). The results of the first election were declared on July 2, 1985.

court held that the selection of dates for special elections and for candidate qualifying periods is a voting practice that has the potential for discrimination. The court observed that "the wide manipulation of the dates of candidate qualification and of voting—*possible* under the emergency provision of the Texas election law—provide a potential for discrimination. Therefore, any variation from the election dates stated in the statute, having a potential for discrimination, must be precleared" (J.S. App. A2-A3 (emphasis in original)).

The court rejected appellants' contention that the election plan did not constitute a change subject to preclearance because prior to November 1, 1972—the date Texas became subject to Section 5—Texas governors had exercised their statutory discretion to call special elections in the manner followed in the present case. The court stated that "[p]reexisting *specific* procedures and practices need not be precleared, but the preexisting exercise of discretion to schedule election dates at will cannot be perpetuated without destroying the Voting Rights Act" (J.S. App. A3 (emphasis in original)).

The court also rejected appellants' argument that preclearance by the Attorney General of the statutes authorizing the Governor to set "emergency" special election dates eliminated the preclearance requirement with respect to the Governor's exercise of that statutory authority (J.S. App. A3).[5] The court relied upon

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[5] The statutory provision authorizing the Governor's action —article 2.01b of the Texas Election Code—was precleared when it first was enacted in 1975, when it was readopted in 1977, and when it was amended in 1983 to require the governor to identify the nature of the emergency and to limit the governor's choice of election dates to Tuesdays and Satur-

a provision of the Department of Justice procedures relating to Section 5 that states that the failure of the Attorney General to interpose an objection to enabling legislation does not exempt the jurisdiction from the requirement of preclearance "when it seeks or is required to institute [a] change" pursuant to such legislation (28 C.F.R. 51.14(a)).

The district court ordered appellants to submit the election plan for preclearance by August 9, 1985, and stated that if they failed to do so the election would be declared void (J.S. App. A4).[6] The court stated that if appellants submitted the plan to the Attorney General by August 9, 1985, and the plan was precleared by August 15, 1985, the election results would stand and no further relief would be granted (*ibid.*).

On August 6, 1985, appellants applied to this Court for a stay of the three-judge court's judgment; their application was denied by Justice White on the same day (*Texas* v. *United States*, No. A-106). Appellants submitted the special election plan for preclearance on August 8, 1985, and the Attorney General precleared the plan on August 14, 1985 (J.S. 5).

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days (J.S. App. F1-F4). The 1977 preclearance letter informed the State that "any changes in election date made pursuant to [art. 2.01b] are subject to the preclearance requirements of Section 5" (J.S. App. F3).

[6] The runoff election was held as scheduled on August 3, 1985 (J.S. 4).

ARGUMENT

The district court properly held that Texas was required to submit for preclearance the "emergency" special election plan at issue in this case. The questions presented by appellants are neither "substantial" nor "novel" (J.S. 8); they essentially are controlled by this Court's decision in *NAACP* v. *Hampton County Election Commission*, No. 83-1015 (Feb. 27, 1985). Plenary review by this Court therefore is not warranted.

1. Appellants' sole claim is that the special election plan adopted by Governor White was a discretionary decision not subject to preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. This argument is meritless.

a. Section 5 applies when a covered jurisdiction [7] "enact[s] or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on" a particular date, which in the case of Texas is November 1, 1972 (42 U.S.C. 1973c). In delineating the scope of Section 5, this Court has emphasized Congress's "intention that all changes [in voting practices], no matter how small, be subjected to § 5 scrutiny." *Allen* v. *State Board of Elections*, 393 U.S. 544, 568 (1969); see also *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 38 (1978); *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 122-124 (1978). The Court applied this principle in *Hampton County*, holding that Section 5 required preclearance of a decision to alter the timing of a

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[7] It is undisputed that Texas is a state covered by Section 5 (J.S. 11-12).

candidate qualifying period and an election date—the very changes at issue in the present case.

In *Hampton County*, the Attorney General had precleared a statute substituting elected district school boards for appointed boards of education. The statute established an August qualifying period for school board candidates and scheduled the election for November, but the statute was not precleared until after the date for the November election had passed.[8] After the county election commissioners received the notification of preclearance, they scheduled a March special election for the school board positions but declined to establish a new candidate qualifying period. The election commissioners decided to use the candidate filings from the previous August qualification period, during which time the new statute had been under review by the Attorney General.[9]

This Court held that the county was required to submit this special election schedule for preclearance under Section 5. The Court rejected the local officials' argument that the special election schedule was "merely an administrative effort to comply with a statute that had already received preclearance, * * *

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[8] The statute at issue in *Hampton County* was not submitted for preclearance until June 16, 1982, although it was enacted on April 9, 1982 (*Hampton County*, slip op. 4, 13 & n.31). The Attorney General interposed an objection on August 23, 1982 (*id.* at 4). The State requested reconsideration, and, on November 19, 1982, the Attorney General withdrew his objection (*id.* at 5).

[9] County officials accepted candidate filings during the statutory period of August 16 through August 31 although the statute had not been precleared. Filings even were accepted after the Attorney General's initial objection on August 23. *Hampton County*, slip op. 4-5.

not a change of such magnitude as to trigger the requirements of § 5." *Hampton County*, slip op. 11. The Court observed that prior decisions "recognize that to effectuate the congressional purpose, § 5 is to be given broad scope. * * * [F]ar from exempting alterations that might be perceived as minor, Congress failed to adopt such a suggestion when it was proposed in debates on the original Act" (slip op. 9 (footnote omitted)).[10]

Reaffirming its decisions in *Hadnott* v. *Amos*, 394 U.S. 358, 365-366 (1969) and *Allen* v. *State Board of Elections*, 393 U.S. 544, 551, 570 (1969), which held that the rescheduling of a candidate filing period is a change that requires preclearance under Section 5 (*Hampton County*, slip op. 9-10), the Court concluded that changes in the timing of a candidate qualifying period and changes in the scheduling of an election are changes subject to preclearance under Section 5 (slip op. 11). The Court observed that it was immaterial that the changes were not effected by statute, stating that "the form of a change in voting procedures cannot determine whether it is within the scope of § 5. That section reaches informal as well as formal changes" (*ibid.*).[11]

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[10] The Court observed that in the legislative history of the 1982 extension of the Voting Rights Act Congress "specifically endorsed a broad construction of [Section 5]." Slip op. 9; see also H.R. Rep. 97-227, 97th Cong., 1st Sess. 34-35 (1981).

[11] The Court noted that "[a]ny doubt that these changes are covered by § 5 is resolved by the construction placed upon the Act by the Attorney General, which is entitled to considerable deference" (*Hampton County*, slip op. 11 (footnote omitted)). Department of Justice regulations provide that "[a]ny change affecting voting, even though it appears to be minor or indirect * * * must meet the Section 5 preclearance requirement" (28 C.F.R. 51.11).

Hampton County makes clear that the special election plan at issue here effected a change subject to preclearance under Section 5. Governor White's order establishing a candidate qualifying period and election dates is indistinguishable from the changes that the Court there held to be subject to preclearance under Section 5.[12]

b. Appellants contend (J.S. 10-11, 13) that Governor White's special election plan did not constitute a change subject to preclearance under Section 5 because the Governor "followed the very practice in effect on November 1, 1972." The inquiry under Section 5 is whether the particular voting practice is "different from that in force or effect on November 1, 1972" (42 U.S.C. 1973c), but appellants' analysis of Texas law is incorrect. The voting procedures at issue here plainly constitute a change from pre-November 1, 1972 procedures.

In 1972, Texas governors exercised virtually complete discretion in scheduling special elections to fill vacancies in public offices. The only basic restriction upon this authority was that the election could not occur less than 20 days or more than 90 days after the first public notice of the order calling the election. See Tex. Elec. Code Ann. arts. 2.01, 4.01, 4.09(1) (Vernon 1967).

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[12] Between January 1, 1980, and December 31, 1984, the Department of Justice reviewed 2,204 voting changes categorized as special election changes, which include establishment of dates for special elections; 130 changes categorized as candidate qualification changes, including changes in candidate qualification periods; and 627 changes categorized as bond election changes (GX 9, at 2-3, Declaration of Sandra S. Coleman; GX 13, Selected Section 5 objection letters concerning election schedules).

The statutory provisions authorizing Governor White to issue the order that is the subject of this case are quite different. The statute establishes uniform dates for special elections and provides that the governor may select a different date only if he "finds the existence of a emergency that warrants calling the election for an earlier date" and his proclamation "identifies the nature of the emergency" (Tex. Elec. Code Ann. art. 2.01b (Vernon Supp. 1985)). Moreover, the governor may only call the election for a Tuesday or a Saturday (*ibid.*). These procedures for the calling of a special election are materially different from the procedures in existence prior to November 1, 1972. Accordingly, an order issued pursuant to these procedures cannot be exempted from preclearance under Section 5 on the ground that there has been no change from pre-November 1, 1972 practice.[13]

c. Appellants also contend (J.S. 11-13) that the Governor's special election plan was not subject to preclearance because the statutory provisions authorizing the Governor to set special election schedules previously had been precleared under Section 5.

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[13] Appellants argue (J.S. 13) that the procedures are the same because Texas governors consistently call special elections on the earliest possible date to fill United States representative vacancies. First, appellants' two pre-November 1, 1972 examples (J.S. App. F6-F7) hardly establish a consistent pattern. Second, the governor's discretion now flows from a different statutory scheme. Indeed, appellants implicitly recognize this fact in their argument (see pages 11-14, *infra*) that preclearance was not required here because the statutes that were the source of Governor White's authority previously had been precleared. Since the Governor's action was based upon post-1972 statutes, it necessarily constitutes a change from the pre-1972 procedures.

The setting of the election schedule at issue here was an exercise of the Governor's discretion in the specific circumstances of this particular election. Since the State did not submit this election schedule at the time the statute was precleared, the Attorney General did not have an opportunity to determine whether the particular dates chosen by the Governor for this election had the purpose or effect of denying or abridging the right to vote on a prohibited basis. The statutes that were precleared merely gave the Governor the power to declare an emergency and to choose a date for a special election. By failing to object to this procedure, the Attorney General cannot be said to have approved all future exercises of that power by every governor in all possible circumstances. Such a blanket approval is directly contrary to the searching, situation-specific analysis that is required under Section 5. See *Dougherty County Board of Education* v. *White*, 439 U.S. at 41.[14]

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[14] Appellants portray their argument as an effort to carve out a limited area of discretion for state officials (J.S. 9, 13), but their position actually poses a considerable threat to the effectiveness of the preclearance process because covered jurisdictions routinely make discretionary decisions pursuant to preexisting statutory authority. For example, state statutes often delegate to local officials the authority to select polling places. See, *e.g.*, Tex. Elec. Code Ann. § 43.002 (Vernon Supp. 1986). Under appellants' theory these decisions would amount to limited exercises of discretion that need not be precleared, but it is well established that polling place changes must be submitted for preclearance under Section 5 (see *Perkins* v. *Matthews*, 400 U.S. 379 (1971)). As the three-judge court recognized, "[p]reexisting *specific* procedures and practices need not be precleared, but the preexisting exercise of discretion to schedule election dates at will cannot be perpetuated without destroying the Voting Rights Act" (J.S. App. A3 (emphasis in original)).

Appellants also contend (J.S. 14) that preclearance of the statute was sufficient to preclear the Governor's exercise of

Moreover, this Court in *Hampton County* rejected an argument similar to appellants' position here. The county officials contended that preclearance of the special election schedule was not required because the Attorney General had precleared the underlying statute establishing elected school boards. This Court noted that the statute provided for a different election schedule. It held that a "change in voting procedures * * * must be submitted 'in some unambiguous and recordable manner.' A change that was never submitted at all does not meet this standard." Slip op. 15 (citations omitted) (quoting *Allen* v. *State Board of Elections*, 393 U.S. at 571); see also *McCain* v. *Lybrand*, 465 U.S. 236, 249-250 (1984). Since the special election plan at issue here was not submitted to the Attorney General along with the statute, it could not have been precleared with the statute.[15]

Finally, the relevant Department of Justice procedural guidelines confirm that the argument advanced by appellants is incorrect. The guidelines make clear that the Attorney General's failure to interpose an objection to legislation establishing procedures regarding voting changes or enabling state officials to insti-

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discretion because the Texas statute limits the governor's discretion. However, the statute contains no definite standards that would permit a general determination concerning the discriminatory effect of the governor's exercise of this authority.

[15] Appellants attempt to distinguish *Hampton County* on the ground that the statute at issue there did not confer any discretion upon county officials (J.S. 14). However, the Court focused on whether the Attorney General had examined the dates for the candidate qualifying period and special election, not the source of the county officials' authority to call the special election.

tute voting changes does not exempt from the preclearance requirement state officials' exercise of that authority. With respect to procedural legislation the regulations provide (28 C.F.R. 51.15) that "[t]he failure of the Attorney General to interpose an objection to a procedure for instituting a change affecting voting does not exempt the substantive change from the preclearance requirement." The guideline concerning enabling legislation states (28 C.F.R. 51.14 (a)):

> The failure of the Attorney General to interpose an objection to legislation: (1) That enables or permits political subunits to institute a voting change or (2) that requires or enables political subunits to institute a voting change upon some future event or if they satisfy certain criteria does not exempt the political subunit itself from the requirement to obtain preclearance when it seeks or is required to institute the change in question, unless implementation by the subunit is explicitly included and described in the submission of such parent legislation.

It is settled that the Attorney General's construction of the Act is entitled to considerable deference. *Hampton County*, slip op. 11-12; *United States* v. *Sheffield Board of Commissioners*, 435 U.S. at 131; *Dougherty County Board of Education* v. *White*, 439 U.S. at 39. These regulations therefore provide strong support for the conclusion that the preclearance of the underlying statute did not exempt the special election plan from preclearance under Section 5.[16]

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[16] Appellants suggest (J.S. 12) that 28 C.F.R. 51.14 is inapposite because that provision refers to "political subunits," a term that does not include the State itself (see 28 C.F.R. 51.6). However, the reasoning of the provision is equally

d. Finally, appellants suggest (J.S. 15) that Section 5 should not be interpreted to cover the changes in election scheduling at issue here because the Attorney General might delay preclearance beyond the 90 days within which the governor is required by statute to call a special election to fill a vacancy (Tex. Elec. Code Ann. art. 4.09 (Vernon Supp. 1985)), thereby prolonging vacancies in important public offices. As appellants recognize (J.S. 15), however, the Attorney General has only 60 days within which to object to a change submitted for preclearance under Section 5. Their claim that the period is "freely extendable" greatly overstates the facts. In *Georgia* v. *United States*, 411 U.S. 526, 539-541 (1973), the Court upheld a regulation providing that the 60-day period does not commence until a submission is re-

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applicable to legislation authorizing a state-level official to exercise discretion. It would make little sense to exempt from Section 5 review a governor's exercise of discretion when identical voting changes would require Section 5 review if effectuated by a political subunit of the state. In addition, appellants were notified in 1977, when the statute granting this discretion was reenacted, that "any changes in election date made pursuant to [that statute were] subject to the preclearance requirements of Section 5" (J.S. App. F3). Moreover, appellants' argument does not apply to 28 C.F.R. 51.15, which governs preclearance of procedural legislation, because that regulation includes states as well as political subunits.

The decision in *Turner* v. *Fainter*, No. A83CA35 (W.D. Tex. Feb. 8, 1983), holding that the preclearance of the statutes exempted from the preclearance requirement an order establishing a special election schedule, is unpersuasive because it predated this Court's decision in *Hampton County* and did not discuss the relevant Department of Justice guidelines.

ceived that satisfies the applicable standards.[17] Since the contents of a proper submission are spelled out in the Department of Justice guidelines (see 28 C.F.R. 51.24, 51.25, 51.26), a state in most instances can assure that the 60-day period begins with its initial submission.

Moreover, the guidelines specifically provide that a state may request that the Attorney General review its submission on an expedited basis (28 C.F.R. 51.32). The Attorney General's offer in this case to attempt to process appellants' submission within 24 hours so as to act before the election (J.S. App. A2), and the fact that appellants' submission after the election was processed in six days, shows that Section 5 procedures can be expedited in cases presenting exigent circumstances.

Although it is possible that the time needed for preclearance might delay a jurisdiction's ability to hold an election on short notice, it does not follow, as appellants contend (J.S. 15), that such a possibility demonstrates that Congress could not have intended that such changes in election schedules be submitted for preclearance. Congress concluded in its most recent extension of the provisions of Section 5, that "the preclearance remedy is still vital to protecting voting rights in the covered jurisdictions" (S. Rep. 97-417, 97th Cong., 2d Sess. 14 (1982)), and that Section 5 "remain[s] necessary and appropriate legislation to ensure the full enforcement of the rights guaranteed by the Fourteenth and Fifteenth Amendments to the Constitution" (S. Rep. 97-417, *supra*, at 9-10).

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[17] That portion of the regulations now is codified at 28 C.F.R. 51.35. At the time of the decision in *Georgia* v. *United States*, *supra*, the relevant Section was 28 C.F.R. 51.18 (1972).

In extending Section 5, Congress thus has exercised its constitutional powers in order to eradicate discrimination in voting on the basis of race, color or membership in a language minority. The theoretical possibility of delay is not a sufficient basis for threatening these goals by adopting a narrow interpretation of Section 5.[18]

2. We agree with appellants (J.S. 15) that this case is not moot even though appellants have complied with the district court's order requiring submission of the election plan and the Attorney General has not objected to the plan. An exception to the mootness doctrine was articulated by this Court in *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), for situations that are "capable of repetition, yet evading review." In *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975), the Court explained that, in the absence of a class action, this doctrine is limited to situations in which two elements are present:

> (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.

The chart of special election proclamations included in appellants' appendix (J.S. App. F6-F9) demon-

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[18] Appellants could avoid submitting schedules for emergency special elections by devising and obtaining preclearance of a system for scheduling such elections that does not involve the exercise of discretion. For example, Texas could enact a statute providing that an election to fill a congressional vacancy always would be held on the Saturday a fixed number of weeks following the minimum statutory notice period required under state law.

strates that Texas special elections frequently are held pursuant to an "emergency" schedule established by the Governor. There is thus a reasonable expectation that this controversy between appellants and the United States will recur.

In addition, the "emergency" special election process always will be completed before the Section 5 preclearance issue can be litigated fully unless this Court were to hear the case on an extremely expedited basis. To be sure, Texas could have prolonged the controversy in this case by refusing to submit the election plan for preclearance, but the three-judge court then would have voided the election (J.S. App. A4). The State should not be required to forego representation in Congress in order to present the issue for review by this Court.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

WALTER W. BARNETT
MARIE KLIMESZ MCELDERRY
Attorneys

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THE STATE OF TEXAS, *et al.*,
Appellants

vs.

THE UNITED STATES OF AMERICA,
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On Appeal from the United States Court for the Western District of Texas

APPELLANTS' REPLY BRIEF

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant Attorney General for Litigation

W. ROBERT GRAY
Assistant Attorney General and Attorney of Record

ROBERT LEMENS
Assistant Attorney General

Supreme Court Building
P.O. Box 12548; Capitol Station
Austin, Texas 78711
(512) 463-2100

Attorneys for Appellants

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APPELLANTS' REPLY BRIEF

The State of Texas, its Governor Mark White, and its Secretary of State Myra A. McDaniel (collectively designated as "Texas") oppose the motion of the United States to affirm the holding of the district court in this cause and respectfully renew their request that this Court note probable jurisdiction in, and grant plenary consideration of, this case.

ARGUMENT

1. The Justice Department ("Justice"), in its motion to affirm, persists in its mistaken assertion that *NAACP v. Hampton County Election Commission*, 105 S.Ct. 1128 (1985), controls the disposition of this case. Mot. to Aff. 7. This position obscures the novelty and importance of the issues presented by the present case—whether established state standards, practices, or procedures with discretionary provisions and validation under section 5 of the Voting Rights Act of 1965, as amended (42 U.S.C. §1973c (1982)) ("section 5"), may lawfully authorize State officials' limited exercise of this discretion in the selection of voting dates; and whether section 5 coverage

indeed precludes any exercise of discretion by State officials.

Justice's motion is replete with assertions, express and implied, that *Hampton* is controlling (see, e.g., Mot. to Aff. 7-10, 13 & n. 15). One assertion, however, is paradigmatic of Justice's failure to understand the nature of that case, and will accordingly be extensively analyzed to illustrate Justice's misreasoning. In a footnote Justice argues,

> Appellants attempt to distinguish *Hampton County* on the ground that the statute at issue there did not confer any discretion upon county officials (J.S. 14). However, the Court focused on whether the Attorney General had examined *the dates* for the candidate qualifying period and special election, not *the source of the county officials' authority to call the special election.*

Mot. to Aff. 13 n.15 (emphasis supplied). Centuries ago the master—and inventor—of formal logic identified the fallacy in this line of argument.

> Knowledge of a fact and knowledge of the reason for it differ. . . [Consider,] *e.g.*, the proof that the planets are near because they do not twinkle. . . [T]his syllogism proves not the reason but the fact; for it is not because the planets do not twinkle that they are near, but because they are near that they do not twinkle.

Aristotle, *Posterior Analytics* I, xiii, 78a22-40 (Loeb ed., H. Tredennick trans. (1966) at 85, 87).

Thus the election officials in *Hampton* did not act in violation of section 5 *because* they exercised discretion in selecting qualification and election dates. Rather, their selection of these dates violated section 5 *because* they had no underlying authority—statutory or traditional—for their selection of them and, *a fortiori*, had no section 5 preclearance or other validation for their actions. Texas election officials, in contrast, acted on the basis of the crucial element of authority missing altogether in *Hampton* because Texas officials had both

precleared statutory authority and a valid practice (predating section 5 applicability) to justify their actions. J.S. at 11-13.

Justice's position obliterates this central distinction between *Hampton* and the present case, and, in so doing, obscures the importance of this case. Texas emphatically asserts that it had the underlying authority in its own laws and traditions for its officials' actions, that these standards, practices, and procedures were valid under section 5, and that this Court should affirm the lawfulness of these officials' limited discretionary actions under section 5.

2. Coverage under section 5 of the Voting Rights Act of changes in state election standards, practices, or procedures is determined by "[1] whether such changes have the potential for diluting the value of the [minority] vote *and* [2] are within the definitional terms of § 5." *Georgia v. United States,* 411 U.S. 526, 534 (1973) (emphasis supplied). The section 5 definition of such a change requires that a current suspect standard, practice, or procedure be compared with a corresponding *past* standard, practices, or procedure. J.S. at 10. The allowable variation of election dates built into Texas law did not allow such a comparison with the past, since all possible dates for selection were contemporaneously available for official choice. J.S. at 10-11. Thus the official acts in question here did not conform to the second prong of the *Georgia* requirement for a section 5 change—the definitional prong.

Justice attempts to collapse the required definitional element of past comparison into the other requirement for section 5 coverage—that there be potential for dilution of minority voting strength. Mot. to Aff. 7-8, 9. Attention to one case cited by Justice for the proposition that Texas officials' actions involved section 5 "changes" illustrates this point. Mot. to Aff. 7. In *United States v. Board of Commissioners of Sheffield, Alabama,* 435 U.S. 110 (1978), this Court reviewed a number of its cases granting very broad scope to the coverage of section 5. *Id.* at 122-124. The Court concluded, without express reference to the definitional element of section 5:

> In each case, federal scrutiny of the proposed change was required because the change had *the potential*

> *to deny or dilute rights conferred by §4(a)* [of the Voting Rights Act].

Id. at 123 (emphasis supplied).

Justice later shifts its ground, however, and instead argues that Texas officials in the questioned election did indeed engage in a practice "different from that in force or effect on November 1, 1972." 42 U.S.C. § 1973c (1982). Mot. to Aff. 10. The argument is that Tex. Elec. Code Ann. art. 2.01b (Vernon Supp. 1985) was amended in 1983 to impose more stringent controls on the Governor's calling of emergency elections than those which existed under the pre-1972 practice. Even if, *arguendo,* this 1983 amendment produced a section 5 "change" when compared with the pre-1972 practice, there was no lapse in section 5 validity. The change in art. 2.01b has been submitted and precleared. R. Exh. 6 (Supp. App. to J.S. at F-3).

Justice's argument that "[s]ince Governor White's action was based upon post-1972 statutes, it necessarily constitutes a change from the pre-1972 procedures" is equally vapid. Mot. to Aff. 11 n.13. All the Texas election statutes in question here have either been pre-cleared or pre-exist the 1972 section 5 effective date in Texas. J.S. at 11-12 & n.7. Even if the operation of these statutes constitutes a "change" from pre-1972 practice, Justice's argument is stillborn. Following these statutes in the selection of election dates still produces no difference from a past practice that comprises the essential section 5 definitional element, because these statutes—especially art. 2.01b—contain within themselves the sufficient authority for concurrent choice and rejection of alternative election dates, authority which in no way involves a retrospective consideration of past standards, practices, or procedures.

3. Justice complains that the Governor's exercise of discretion deprived it of the opportunity for section 5 review of his action "in the specific circumstances of this particular election." Mot. to Aff. 12. The first answer to this argument is that Justice had the opportunity, when the relevant component parts of the Texas Election Code were submitted to it for section 5 preclearance review, to analyze every possible operation of these statutes (which have definite and cognizable perimeters

to the discretion authorized) and to interpose specific objections if any defect were found. See J.S. at 14. Instead, Justice has followed the practice of furnishing clearance letters with opaque and vague references to objections which might arise under unspecified circumstances. R. Exh. 4-6 (Supp. App. to J.S. at F-1, F-2, F-3). If the Attorney General had interposed some specific objection to the operation of the statutory scheme here, the State could either have amended the offending statute to bring it into compliance or "the State [could] still [have] enforce[d] the legislation upon securing a declaratory judgment in the District Court for the District of Columbia." *Allen v. State Board of Elections*, 393 U.S. 544, 549 (1969). It is paradoxical that Justice shifts the focus away from a problem largely of its own making.

The second answer to Justice's complaint is that their approach would make enforcement of section 5 unmanageable if every election procedure must be examined "in the specific circumstances of [a] particular election." Mot. to Aff. 12. Even state election standards, practices, or procedures with fixed, theoretically nondiscretionary provisions must be applied to novel, changing conditions. There will always be contingent matters to be considered and some discretion to be applied. Some restrictions must therefore be placed on Justice's consideration of the narrow contexts of particular elections; otherwise "the sheer volume of applications for preclearance" caused by such review could burgeon into an unworkable caseload for Justice and for the federal courts. *Cf. City of Port Arthur v. United States*, 459 U.S. 159, 103 S.Ct. 530, 538-39 (1982) (Powell, J., dissenting).

4. Justice implies that it has both the power and the duty to process section 5 submissions promptly in order not to interfere with a State official's exercise of discretion in a short-term emergency. Mot. to Aff. 15-17. Certainly the Department has no legal duty to make an expedited review, because "the Attorney General cannot guarantee that such consideration can be given." 28 C.F.R. § 51.32(b) (1984). As for its power in these matters, it exists principally to extend the statutory 60-day period, not to contract it.

In *Georgia v. United States, supra*, 411 U.S. 526, the Court

outlined *two* ways in which Justice can extend the period: (1) when the Attorney General (or his delegate) "cannot within the 60-day time period satisfy himself that the change is without a discriminatory purpose or effect," *id.* at 537 (see current 28 C.F.R. § 51.39(e) (1984)), he may object and "parties whose submissions are objected to may seek reconsideration . . . and obtain a ruling within 60 days of that request", *id.* at 539 (see current 28 C.F.R. § 51.47(a) (1984)); and (2) when the Attorney General notifies a submitting authority that a section 5 submission is incomplete, a new 60-day period commences only when the required information is furnished. *Id.* at 539-41. (see current 28 C.F.R. § 51.35(a) (1984)). Justice failed altogether to identify the first method of extension, and clothed its discussion of the second in a pleasant description of how the initial 60-day period is usually ample for section 5 review. Mot. to Aff. 15-16.

These assertions that the Justice Department bureaucracy can process, amid its ever increasing caseload, the submissions for exercise of short-term state discretion provide tepid, if any, assurance. Government by "bureaucracy [is] the rule of nobody." H. Arendt, *The Human Condition* 45 (1958). With so many opportunities within the bureauracy to obliterate through delay the Governor's power of short-term discretion in emergencies, Texas objects to the relegation of its vital electoral interests to such a "rule of nobody" and argues instead that section 5 preclearance, once obtained, should provide guidance for the conduct of state elections without unnecessary delay or interference.

CONCLUSION

For the foregoing reasons, this Court should deny the motion to affirm and instead should note probable jurisdiction of this appeal.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant Attorney
General for Litigation

W. ROBERT GRAY
Assistant Attorney General
and Attorney of Record

ROBERT LEMENS
Assistant Attorney General

P.O. Box 12548
Austin, Texas 78711
(512) 463-2100

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